TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~459~~ 147.

ORLANDO F. BACON, PLAINTIFF IN ERROR,

vs.

PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER, AND GILBERT WALKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED NOVEMBER 13, 1905.

(19,961.)

(19,961.)

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1906.

1 Filed Oct. 10th, 1905. Sol Hasbrouck, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of Idaho:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Idaho before you at the June sitting of the May term 1905, thereof, between Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker, plaintiffs and respondents *vs.* Orlando F. Bacon, defendant and appellant, a manifest error has happened to the great damage of the said defendant Orlando F. Bacon as by his complaint appears:

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before sixty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
2 of the Supreme Court of the United States, this tenth day of October, 1905.

Done in the City of Boise with the seal of the Circuit Court of the United States for the District of Idaho attached.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk Circuit Court United States,
District of Idaho, Central Division.

Allowed:

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court
of the State of Idaho.

3 *Return to Writ.*

UNITED STATES OF AMERICA, *Supreme Court of Idaho, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, in the City of Boise, this 27th day of October, 1905.

SOL HASBROUCK,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiffs' costs, $8.50, paid by Paul H. Walker.
Defendant's costs, $1.25, paid by O. F. Bacon.
Costs of transcript, $17.75, paid by Orlando F. Bacon.

[Seal of Supreme Court, State of Idaho.]

SOL HASBROUCK,
Clerk of the Supreme Court, Idaho.

4 No. —.

In the Supreme Court of the State of Idaho, May Term, 1905.

PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER and GILBERT WALKER, Respondents,
vs.
O. F. BACON, Appellant.

Transcript.

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for Elmore County

Wyman & Wyman, Attorneys for Appellant.
W. C. Howie, Attorney for Respondents.

Filed —— —, 1905.

—— ——, *Clerk.*

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6 *Complaint.*

In Justice Court of Little Camas Precinct, Elmore County, State of Idaho.

PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER and GILBERT WALKER, Plaintiffs,
vs.
O. F. BACON, Defendant.

Plaintiffs in the above entitled cause, for cause of action against defendant in said cause allege:

That plaintiffs are the owners of and in the possession of the following described lands situated in Elmore County, State of Idaho, to wit: The northeast quarter of the northeast quarter of section seventeen and the east half of the southeast quarter and the southeast quarter of the northeast quarter of section eight, in township two south, range eleven east, Boise Meridian, and of a dwelling house thereon in which said plaintiffs reside.

That plaintiffs have a large number of horses and cattle and that it is necessary for plaintiffs to keep a large number of said horses and cattle at and in the vicinity of said lands and said dwelling house and for that purpose it is necessary for plaintiffs to have the grass that grows near and in the vicinity of said dwelling house and that there is not sufficient pasturage for said horses and cattle so needed by plaintiffs on the said lands belonging to said plaintiffs and that plaintiffs need to pasture said horses and cattle on the public lands in the vicinity of said dwelling house.

That defendant is the owner of a large number of sheep,
7 towit, about three thousand head, the exact number being to plaintiffs unknown, and that on the 21st to the 25th days of May, inclusive, 1904, said defendant caused said sheep to be herded and permitted them to graze within two miles of said dwelling house of plaintiffs and on the lands on which it is necessary for plaintiffs to pasture their said cattle and horses, and that plaintiffs are thereby damaged in the sum one hundred dollars.

Wherefore, plaintiffs demand judgment against defendant for the sum of one hundred dollars and for costs of this suit.

W. C. HOWIE,
Attorney for Plaintiffs.

Filed in the Justice's Court May 26, 1904.
Filed in the District Court June 21, 1904.

Demurrer.

(Title of Court and Cause.)

Comes now the defendant above named and to plaintiffs' complaint demurs on the following grounds, to wit:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint does not state any cause of action other than a violaiton of Section- 1210 and 1211 of the Reversed Statutes of the State of Idaho and said sections are in violation of Article XIV of the Amendments of the Constitution of the United States in that their effect is to deprive this defendant of his property without due process of law and that they deny to defendant the equal protection of the laws.

Wherefore defendant prays that he may not be required to plead further to said complaint but that he recover his costs.

WYMAN & WYMAN,
Defendant's Attorneys.

Filed in the Justice's Court May 31, 1904.
Filed in the District Court June 21, 1904.

Answer.

(Title of Court and Cause.)

Comes now the defendant above named and to plaintiffs' complaint makes answer as follows:

I.

Denies each and every allegation in said complaint contained.

Wherefore having answered said complaint prays that he have judgment for his costs.

WYMAN & WYMAN,
Defendant's Attorneys.

Filed in Justice's Court May 31, 1904.
Filed in District Court June 21, 1904.

Judgment in Justice Court.

(Title of Court and Cause.)

MAY 31, 1904.

This cause came on to be heard on the defendant's demur-. After due consideration it is hereby ordered that the demurrer be overruled.

Thereupon defendant filed answer, in writing, to plain-
9 tiffs' compalnt, — the cause *thereon* for trial.

The following witnesses were duly called, sworn and examined on the part of the p-aintiffs:

Charles H. Walker, Wm. E. Wilson, Ed Trumbal, Pete Turner, Joe Serpa, Joe Williams, W. H. Blackman, John Johnson.

The plaintiffs rested.

The defendant introduced no evidence and the case was closed.

After argument, the Court being fully advised in the premises it was ordered that judgment be ordered for plaintiffs as prayed for in their complaint.

Wherefore, it is ordered, adjudged and decreed that plaintiffs have judgment against defendant for the sum of one hundred dollars and their costs, taxed at sixty-seven dollars and thirty cents.

SOLON McCOY,
Justice of the Peace.

Amended Answer.

(Title of Court and Cause.)

Comes now the defendant in the above entitled action and to plaintiffs' complaint makes this his amended answer as follows:

I.

That said complaint does not state any cause of action other than a violation of Sections 1210 and 1211 of the Revised Statutes of the State of Idaho and said sections are in violation of Article XIV of the Amendments of the Constitution of the United States in that their effect is to deprive this defendant of his property with-
10 out due process of law and that they deny to defendant the equal protection of the laws; and this defendant hereby claims the protection of and the immunity granted by said Constitution and amendments thereto.

Wherefore defendant prays that he may have judgment for his costs.

WYMAN & WYMAN,
Defendant's Attorneys.

Service hereof admitted *the* November 1, 1904.

W. C. HOWIE,
Attorney for Plaintiffs.

Filed November 1, 1904.

Minutes of the Court.

Civil No. 9.

Seventh Judicial Day of the Fourth Judicial District Court of the State of Idaho in and for Elmore County.

PAUL H. WALKER, Plaintiff,
vs.
O. F. BACON, Defendant.

MOUNTAIN HOME, IDAHO, *Nov.* 1, 1904.

This cause came on to be heard on defendant's demurrer, W. C. Howie appearing as attorney for plaintiff and against said demurrer, Wyman & Wyman appearing for defendant and for said demurrer. After argument by counsel, the Court being fully advised in the premises, it was ordered that said demurrer be overruled. Defendant then asked and was granted leave to file an amended answer. Defendant filed an amended answer under the order of the Court. The cause then came on for trial before the Court without a jury, a jury having been expressly waived. Plaintiff moved for judgment upon the pleadings, and argument by respective counsel. The Court being fully advised in the premises said motion was by the Court sustained, to which defendant duly excepted, whereupon the Court ordered judgment to be entered according to the prayer of plaintiff's complaint.

Judgment.

(Title of Court and Cause.)

This cause came on regularly for trial on the 1st day of November, 1904, on the complaint of plaintiffs, and defendant's amended answer thereto, W. C. Howie appearing for plaintiffs and Wyman & Wyman appearing for defendants. Plaintiffs, by their attorney, moved the Court for judgment for plaintiffs as prayed for in their complaint, upon the pleadings. After argument by the respective counsel, the Court being fully advised in the premises, said motion was sustained.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiffs have and recover of said defendant the sum of one hundred dollars,

together with said plaintiffs' costs and disbursements in this action, taxed at one hundred and thirteen and 10-100 dollars.

12 Dated this 3d day of November, 1904.

LYTTLETON PRICE,
District Judge.

Filed November 3, 1904.
Entered, etc., Nov. 3, 1904.

Notice of Appeal.

(Title of Court and Cause.)

To the Plaintiffs Above Named and to W. C. Howie, Their Attorney:

You will please take notice that the defendant in the above entitled action hereby appeals to the Supreme Court of the State of Idaho from the judgment made in said cause and entered on November 23, 1904, in favor of plaintiffs and against the said defendant and from the whole thereof.

Dated this 10th day of January, 1905.

WYMAN & WYMAN,
Defendant's Attorneys.

Service of the foregoing notice acknowledged this 11th day of January, 1905.

W. C. HOWIE,
Plaintiffs' Attorney.

Filed January 11, 1905.

Attorneys' Certificate.

It is hereby stipulated by the undersigned, the attorneys of record for the respective parties hereto, that the foregoing transcript is correct, that it contains the judgment roll in the said action and

13 that a good and sufficient undertaking in due form on appeal from the judgment entered November 23rd, 1904, was filed herein on January 13, 1905.

(Signed) WYMAN & WYMAN,
Appellant's Attorneys.
W. C. HOWIE,
Respondents' Attorney.

14 Filed June 10, 1905. Sol Hasbrouck, Clerk.

In the Supreme Court of the State of Idaho.

PAUL H. WALKER ET AL., Plaintiff- and Respondent-,
vs.
O. F. BACON, Defendant and Appellant.

Comes now the appellant herein, and moves the Court for a rehearing in the above entitled case. This motion is based upon the following grounds, to-wit:

There is involved in this appeal but one question: That is the constitutionality of Sections 1210 and 1211 of the Revised Statutes of the State of Idaho. The Appellant by his demurrer and answer to the complaint and at all other times has claimed that the law in question is in conflict with and repugnant to the amendments to the Federal Constitution in that it denies to him the equal protection of the law and deprives him of his property without due process of law; he claims and has always claimed in this action that he is not liable under the facts set out in the complaint by reason of the guaranties in the clauses of the Federal Constitution which are above referred to.

These questions were submitted to your Honors upon the hearing on this appeal and were the only ones presented for your
15 Honors' consideration and by the decision and judgment of this Court the Appellant herein is denied the claim so made.

We have nothing to add by way of argument or citation to the brief we have filed, but desire in this formal manner to call to the attention of the Court the fact that Appellant in this case and in this Court and at all other times in this cause has claimed and does now claim the protection of the clauses in the amendments to the Federal Constitution herein referred to and that the decision of the Court has been to deny him this claim: and that there is in this action and upon this appeal drawn in question the validity of certain of the statutes of the State of Idaho herein referred to on the ground that they are repugnant to the Constitution of the United States and the amendments thereof and that the decision of this Court in this case and upon this appeal is in favor of their validity.

We therefore ask that your Honors grant herein a re-hearing.

Respectfully submitted.

WYMAN & WYMAN,
Attorneys for Appellant and Petitioner.

16 BOISE, IDAHO, *May* 25th, 1905.

SUPREME COURT, *State of Idaho, ss:*

Court met pursuant to adjournment—Present: Hon. Charles O. Sctokslager, Chief Justice; Hon. James F. Ailshie, Justice; Hon. Isaac N. Sullivan, Justice, and the officers of the court—when the following among other proceedings were had, to-wit:

1057.

PAUL H. WALKER ET AL., Respondents,
vs.
O. F. BACON, Appellant.

This cause having been set for hearing on this day the same was called. Frank T. Wyman appeared for the appellant and W. C. Howie for the respondents. After argument the cause was submitted and by the court ordered under advisement.

On the 1st day of June, 1905, the following entry appears of record: After entitling the cause:

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called and the decision of the court is delivered by Justice Sullivan to the effect that the judgment of the court below be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the district court of the Fourth Judicaial District in and for the County of Elmore in the above entitled cause, be and the same hereby is affirmed. Costs of this appeal are awarded to respondents.

On June 21st, the following record entry is made, to-wit:

17 The appellant in this case having heretofore filed a petition for a rehearing of this case, and the court having fully considered the same, now on this day the decision of the court is delivered by Justice Ailshie to the effect that the petition be denied.

It is therefore considered, adjudged and decreed by the court that appellant's petition for a rehearing of the above entitled cause be, and the same hereby is, denied.

18 Filed June 1st, 1905. Sol Hasbrouck, Clerk.

In the Supreme Court of the State of Idaho, May Term, 1905.

PAUL H. WALKER ET AL., Respondents,
vs.
O. F. BACON, Appellant.

Two Mile Limit Law—Sections 1210 and 1211, Revised Statutes.—1. A judgment duly and regularly rendered and entered under the provisions of Sections 1210 and 1211 of the Revises Statutes of 1887, known as the two-mile limit law, affirmed under previous decisons of this court.

Stockslager, C. J., dissenting.

Appeal from the District Court of Elmore County; Hon. Lyttleton Price, Judge.

Action to recover damages under what is known as the two-mile limit law. Judgment for plaintiff. Affirmed.

Wyman & Wyman for appellant.
W. C. Howie for respondent.

19 SULLIVAN, *J.:*

This is an action brought to recover damages for herding and grazing sheep within two miles of the dwelling of the plaintiff under the provisions of Sections 1210 and 1211 of the Revised Statutes.

To the complaint the defendant interposed an answer not denying any of the allegations of the complaint, but set up as a defense the unconstitutionality of the provisions of said sections. Counsel for the respondent thereupon moved for judgment on the pleadings, which motion was granted by the court and judgment was entered against the appellant for the sum of $100.00 and costs of suit from which judgment this appeal is taken.

This appeal involves the constitutionality of the provisions of said sections of our Revised Statutes, and on the decisions of this court in the cases of Sifers *v.* Johnson, 7 Idaho, 798; Sweet *v.* Ballentyne, 8 Idaho, 431; Walling *v.* Bown *et al.*, 72 Pac. 960; Phipps *v.* Grover, 75 Pac. 64; Walling *v.* Bown, 76 Pac. 318 and Spencer *v.* Morgan, 79 Pac. 459, the judgment of the court must be affirmed, and it is so ordered. The costs of this appeal are awarded to the respondents.

Ailshie, J., concurs.

Stockslager, C. J., dissents.

20 Filed June 21, 1905. —— ——, Clerk.

In the Supreme Court of the State of Idaho.

PAUL H. WALKER ET AL., Respondents,

vs.

O. F. BACON, Appellant.

(On Petition for Rehearing, June 20, 1905.)

AILSHIE, *J.:*

The petition for a rehearing in this case does not present any matter not heretofore considered by the court. The position of this court on the questions presented is well defined by the numerous opinions in the various cases heretofore cited in this case. The petition is denied.

Sullivan, J., concurs.

Stockslager, C. J., dissents.

21 In the Supreme Court of the State of Idaho.

ORLANDO F. BACON, plaintiff in Error,

vs.

PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER and GILBERT WALKER, Defendants in Error.

Petition for Writ of Error.

Filed Oct. 9th, 1905. Sol Hasbrouck, —.

Your petitioner, Orlando F. Bacon, hereby sets forth that on or about the 21st day of June, 1905, the Supreme Court of the State of Idaho made and entered a final decision and judgment therein in favor of the defendants in error and against Orlando F. Bacon,

plaintiff in error, in which final decision and judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of said Orlando F. Bacon, plaintiff in error, all of which will more in detail appear from the assignment of errors, herewith presented, and which is filed with this petition.

That the said Supreme Court of the State of Idaho is the highest court of the state of Idaho in which a decision in this action could be had.

Wherefore, Orlando F. Bacon, plaintiff in error, petitions and prays for a Writ of Error from the said decision and judg-
22 ment to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Boise, Idaho, October 4th, 1905.

W. E. BORAH,
HARRY C. WYMAN,
FRANK T. WYMAN
Boise, Idaho, Attorneys Plaintiff in Error.

STATE OF IDAHO, *Supreme Court, ss:*

Let the Writ of Error issue upon the execution of a bond by the said Orlando F. Bacon in the sum of Five hundred Dollars. Said bond when approved to act as a supersedeas.

Dated October 9th, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court of the State of Idaho.

23 In the Supreme Court of the State of Idaho.

ORLANDO F. BACON, Plaintiff in Error,
vs.
PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER and GILBERT WALKER, Defendants in Error.

Assignment of Errors.

Filed Oct. 9, 1905. Sol. Hasbrouck, Clerk.

Comes now the above named plaintiff in error and files herewith his petition for a writ of error and says there are errors in the records and proceedings of the above entitled cause and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

1. That the Supreme Court of the State of Idaho in its decision and judgment erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action herein is based, being Sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid

and unconstitutional and in violation of Article XIV of the amendments of the Constitution of the United States in that the said statutes do and each of them does deprive this plaintiff in error of his property without due process of law.

2. That the Supreme Court of the State of Idaho in its decision and judgment in the above entitled cause erred in affirming the judgment of the court below for the reason that the statutes of the state of Idaho upon which the cause of action herein is based, being Sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional and in violation of Article 14 of the Amendments of the Constitution of the United States and that said statutes do and each of them does deny this plaintiff in error the equal protection of the law.

3. The Supreme Court of the State of Idaho erred in holding and deciding that said Sections 1210 and 1211 do not abridge the privileges and immunities of citizens or of this plaintiff in error as guaranteed by the 14th amendment of the Federal Constitution.

24 4. That in deciding said cause and rendering said judgment there was drawn in question the constitution of the United States and the same was necessarily involved in the decision, and the Supreme Court of the State of Idaho would not have rendered its decision nor given judgment without deciding the same against the claim and right under said constitution specially set up by this plaintiff in error.

5. The Supreme Court of the State of Idaho erred in holding and deciding that the defendants in error were entitled to recover as damages or as a penalty the value of the grasses growing upon the public domain within two miles of their dwelling houses eaten and destroyed by the sheep of the plaintiff in error and that thereby plaintiff in error was not and is not deprived of property without due process of law or denied the equal protection of the law as provided by the constitution of the United States.

6. The Supreme Court of the State of Idaho erred in holding and deciding that said Sections 1210 and 1211 do not unlawfully discriminate between those engaged in grazing sheep on public domain and those engaged in grazing other stock on said public lands.

Wherefore, Orlando F. Bacon, plaintiff in error, prays that the judgment of said Supreme Court of the State of Idaho be reversed and said court be ordered to cause said action to be dismissed, and for such other relief as this plaintiff in error may be entitled to, and for costs.

W. E. BORAH,
HARRY C. WYMAN,
FRANK T. WYMAN,
Attorneys for Plaintiff in Error, Boise, Idaho.

25 In the Supreme Court of the State of Idaho.

ORLANDO F. BACON, Plaintiff in Error,
vs.
PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER and GILBERT WALKER, Defendants in Error.

Bond.

Filed Oct. 9, 1905. Sol Hasbrouck, Clerk.

Know all men by these presents, That we Orlando F. Bacon as principal and J. C. Pence and W. C. Cleveland as surcties are held and firmly bound unto Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker in the sum of Five Hundred Dollars to be paid to the said Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th day of October, 1905.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the decision and judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

ORLANDO F. BACON,
Principal.
J. C. PENCE,
W. C. CLEVELAND,
Sureties.

STATE OF IDAHO, *County of Ada, ss:*

J. C. Pence and W. C. Cleveland, being each duly sworn, depose and say we are each of lawful age and are citizens of the state of Idaho, and know the contents of the foregoing instrument
26 to which we have attached our names. We each for himself, say we are worth the sum of Five Hundred Dollars over and above all debts, liabilities and exemptions.

J. C. PENCE.
W. C. CLEVELAND.

Subscribed and sworn to before me this 4th day of October, 1905.
[SEAL.] HARRY C. WYMAN,
Notary Public.

The above bond is approved this 9th day of October, 1905.
CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court of the State of Idaho.

27 Filed Oct. 13, 1905. Sol Hasbrouck, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days after the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Idaho wherein Orlando F. Bacon is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Idaho this 13th day of October, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court of the State of Idaho.

Attest:
SOL HASBROUCK,
Clerk of the Supreme Court.

Mountainhome, Idaho, October 25th, 1905.

28 The undersigned, attorney for the defendants in error in the above entitled cause, hereby acknowledges due service of the above citation, and enters an appearance in the Supreme Court of the United States.

W. C. HOWIE,
Attorney for Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker, of Record in the Supreme Court of the State of Idaho.

29 In the Supreme Court of the State of Idaho.

Certificate of Clerk.

ORLANDO F. BACON, Plaintiff in Error,
vs.
PAUL H. WALKER, CHARLES H. WALKER, EUGENE WALKER, AND GILBERT WALKER, Defendants in Error.

I, Sol Hasbrouck, Clerk of the Supreme Court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court this 27th day of October, A. D., 1905.

[Seal of Supreme Court, State of Idaho.]

SOL HASBROUCK,
Clerk of the Supreme Court, State of Idaho.

Endorsed on cover: File No. 19,961. Idaho supreme court. Term No. 459. Orlando F. Bacon, plaintiff in error, vs. Paul H. Walker, Charles H. Walker, Eugene Walker and Gilbert Walker. Filed November 13th, 1905. File No. 19,961.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905

No. 81.

CHARLES BOWN AND LEANDER L. ORMSBY, PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

FILED JULY 21, 1905.

(19,851.)

(19,851.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 349.

CHARLES BOWN AND LEANDER L. ORMSBY, PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1905.

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Acceptance of service of citation	49	28
Clerk's certificate	50	29

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the supreme court of the State of Idaho, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment in a suit which is in the supreme court of the State of Idaho, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Enos C. Walling, plaintiff, and Charles Bown and Leander L. Ormsby, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears,

2 We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C. and filed in the office of the clerk of the United States Supreme Court on or before sixty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of June 1905.

Done in the city of Boise, with the seal of the circuit court of the United States for the district of Idaho, central division, attached.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk of the Circuit Court of the United States.

Allowed.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court of the State of Idaho.

3 Return to Writ.

UNITED STATES OF AMERICA, } ss:
Supreme Court of Idaho, }

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceeding in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court, at Boise, Idaho, this 14th day of July, 1905.

[Seal of Supreme Court, State of Idaho.]

SOL. HASBROUCK,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiff's costs, $5.00, paid by Enos C. Walling.
Defendants' costs, $17.75, paid by Charles Bown & L. L. Ormsby.
Costs of transcript, $30.00, paid by Charles Bown & L. L. Ormsby.

SOL. HASBROUCK,
Clerk of the Supreme Court, Idaho.

4 In the Supreme Court of the State of Idaho, December Term, 1903.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Defendants and Appellants. } No. —.

Transcript.

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Elmore.

Rice & Thompson, Wyman & Wyman, attorneys for appellants.
Daniel McLaughlin, attorney for respondent.

Filed —— —, 1903.
—— ——, Clerk.

5 Complaint.

In the Probate Court in and for Elmore County, State of Idaho.

ENOS C. WALLING, Plaintiff,
vs.
CHARLES BOWN and L. L. ORMSBY, a Co-partner, Defendants.

The plaintiff complains of the defendants and alleges:

I.

That at the time hereinafter mentioned the defendants were a co-partnership doing business as sheep men under the firm name of Ormsby and Bown.

II.

That during the time herein between the 15th day of April, 1902, and the 14th day of May, 1902, the defendants were the owners in possession of and by their agents and servants were in charge and care of certain animals, to wit: Sheep.

III.

That at divers times between mentioned dates said animals ran and grazed upon the land surrounding the plaintiff's dwelling house, within a two mile limit of said dwelling house. Contrary to the provisions of the R. S. of State of Idaho, sections Nos. 1210–11–12.

IV.

That at divers times between the above mentioned dates the said sheep had been herded by the agents and servants of the defendants within the said two mile limit and often approaching within
6 a few rods of the plaintiff's dwelling house. Contrary to the provisions of the R. S. of the State of Idaho of sections Nos. 1210–11–12.

V.

That by reason of the said sheep being herded within the said limit of the said dwelling house, the said sheep have eaten up, injured and destroyed the grass and verdu-e being and growing upon said land within said limit, thus depriving the plaintiff of said grass and verdu-e, being and growing upon said land within said limit, for his cattle and other stock, thus injuring the plaintiff thereby.

VI.

That in consequence of said animals so running, eating and destroying the said grass which was then and there upon said land in said limit, said plaintiff has been deprived of a stock and cattle range within said limit and has been damaged in the sum of $200.00.

VII.

Wherefore, the plaintiff prays judgment in the sum of $200.00 and costs in this action.

(Signed) DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Filed in the probate court May 15, 1902.
Filed in the district court, Nov. 6th, 1902.

Demurrer.

(Title of Court and Cause.)

Comes now the defendants and demur to the plaintiff's complaint, and for ground of said demurrer, say:

7 1st. That said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

W. E. BORAH AND
E. M. WOLFE,
Attorneys for Defendants.

Filed in the probate court May 22, 1902.
Filed in the district court November 6th, 1902.

Answer.

(Title of Court and Cause.)

Comes now the defendants and for answer to the plaintiff's complaint admits, denies and alleges:

First. Admit the allegations in paragraph- one and two of said complaint.

Second. Deny that the sheep of the defendants have at any time or at all grazed or herded within a few rods of the dwelling of the plaintiff or any closer distance than one mile.

Third. Deny that the sheep of the defendants have at any time or at all injured or destroyed the grass or verdu-e growing about the residence of the plaintiff and within a distance of two miles other than such injury or destruction as arises by reason of the ordinary use of said land as commons for general grazing purposes as used by all other stock men. Denies that the defendants have in any manner or at all deprived the plaintiff of grass or verdu-e growing upon the lands on or about the premises of the plaintiff or within two miles of said premises, and denies that by reason of the grazing or herding of said sheep, or by reason of any act or acts upon the part of

8 the defendants, or in any manner or at all, the plaintiff has been injured.

Fourth. Deny that in consequence of said animals or sheep running upon or eating up or destroying said grass or by reason of their grazing upon said land within the limit of two miles or by reason of any act or acts upon the part of the defendants, or in any manner or at all, the plaintiff has been damaged in the sum of three hundred dollars or any sum whatever.

W. E. BORAH AND
E. M. WOLFE,
Attorneys for Defendants.

Duly verified.
Filed in the probate court May —, 1902.
Filed in the district court, November 6, 1902.

Judgment by the Court.

(Title of Court and Cause.)

This cause came on regularly for trial on the sixth day of June, 1902, Dan McLaughlin, Esq., appearing as counsel for plaintiff and E. M. Wolfe, Esq., for defendants. A trial by jury having been expressly waived by the respective parties, this cause was tried before the court, sitting without a jury, whereupon witnesses on the part of plaintiff, to wit: Enos C. Walling, George W. Goble and David A. Kenyon were called and examined on the part of the plaintiff, no witnesses called on the part of the defendants. The evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court de-
9 livers its findings and decision and orders that judgment be entered herein.

Wherefore, by reason of the law and the evidence aforesaid, it is ordered, adjudged and decreed that Enos C. Walling, the plaintiff, do have and recover of and from Charles Bown and L. L. Ormsby the defendants the sum of $200.00 damage with interest on said sum at the rate of 7 per cent. per annum from the date hereof until paid, together with the said plaintiff's costs and disbursements incurred in this action amounting to sheriff fees $12.10, court fees $3.10, total cost $15.20.

Judgment rendered June 6th, 1902.

J. S. WHITE, Judge.

Filed in the probate court, June 6, 1902.
Filed in the district court, November 6, 1902.

Amended Answer.

In the District Court of the Fourth Judicial District of the State of Idaho in and for Elmore County.

ENOS WALLING, Plaintiff,
vs.
CHAS. BOWN and L. L. ORMSBY, Defendants.

Come now the defendants above named and to the plaintiff's complaint make answer as follows:

1. Defendants deny each and every allegation in plaintiff's complaint contained not hereinafter specifically admitted.

2. Defendants admit all the allegations of paragraphs one and two of plaintiff's complaint.

10 3. Defendants admit that during the times in said complaint mentioned plaintiff was the owner of the land therein

mentioned and was in and was entitled to the actual and exclusive possession thereof, and that the same is, and then was, the possessory claim of plaintiff. That said lands are described as follows, to wit: The north one-half of the southwest quarter of section fifteen and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen in township 2 north of range seven east of Boise-meridian, in Elmore county, Idaho.

Defendants further admit that during all of said times plaintiff owned, had and lived in the dwelling house upon said lands.

4. That during all of said times plaintiff's said land was completely surrounded by unoccupied and unappropriated public lands belonging to the United States.

5. Defendants admit that at divers times between the 15th day of April, 1902, and the 14th day of May, 1902, the defendants' said sheep were herded and permitted to graze upon the unoccupied and unappropriated lands of the United States within two miles of the plaintiff's said dwelling house.

6. It is admitted that during said times above mentioned said sheep ate up grass upon the unoccupied and unappropriated public lands of the United States within two miles of the plaintiff's dwelling house.

7. Defendants admit that plaintiff is the owner of a herd of
11 cattle which range upon said unoccupied and unappropriated public lands of the United States within two miles of his said dwelling house, and that but for the action of plaintiff's sheep as herein stated, said cattle would have gotten and eaten said grass. That the grass so eaten by defendants' sheep as herein stated, is, and then was, of the value of two hundred dollars.

8. Defendants allege that the said sheep did not at any time enter, herd or feed upon any of the plaintiff's lands, but were at all times upon the unoccupied and unappropriated lands of the United States.

9. Defendants allege that their said sheep have not at any time or at all injured or destroyed the verdu-e growing upon the lands within two miles of the dwelling house upon plaintiff's said lands above mentioned, other than said injury or destruction was occasioned by reason of the ordinary use of said land as commons for general grazing purposes; and further defendants allege that said lands are ordinarily and commonly so used by all other stock men in that vicinity for grazing of all other kinds of live stock.

10. Defendants allege that said lands situated within two miles of the dwelling house upon plaintiff's said lands, are commonly and usually used, grazed and occupied by other kinds of stock than sheep in the same way and not in any other, than all other public public lands in that vicinity and were so used by defendants with their sheep at the times herein mentioned and in this action complained of.

12 Wherefore, defendants pray that they may have judgment for their costs.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Filed in the district court, Nov. 7, 1902.

Judgment.

(Title of Court and Cause.)

Now on this 7th day of November, A. D. 1902, this cause came regularly on to be heard before the court, Daniel McLaughlin appeared for the plaintiff and Rice and Thompson and Wyman & Wyman appeared for the defendants. Whereupon, by leave of court, plaintiff amended his original complaint and the defendants filed an amended answer. Whereupon the plaintiff moved the court that the plaintiff do have and recover judgment against the defendants on the pleadings for the amount prayed for in the complaint The motion was submitted to the court, and after due consideration, the court being fully advised in the premises, the court granted plaintiff's said motion and ordered that judgment be so entered on the pleadings for the amount prayed for in the amended complaint.

Wherefore, in consideration of the premises, it is by the court ordered, considered and adjudged that the plaintiff Enos C. Walling, do have and recover of and from the defendants L. L. Ormsby and Charles Bown, the sum of two hundred dollars ($200.00) and
13 his costs taxed at the sum of eighteen and 35-100 dollars.

KIRTLAND I. PERKY,
District Judge.

Filed Nov. 7, 1902.
Entered Nov. 7, 1902.

Bill of Exceptions.

(Title of Court and Cause.)

Be it remembered that on this 7th day of November, A. D. 1902, the said cause being regularly on for hearing before the court, Daniel McLaughlin appearing for the plaintiff, and Rice & Thompson and Wyman & Wyman appearing for the defendants, the original complaint was amended and the amended answer was filed by leave of the court; whereupon the plaintiff moved that the plaintiff have and recover judgment against the defendants on the pleadings for the amount prayed for in the complaint.

The motion having been submitted to the court, after due consideration, the court granted plaintiff's said motion and ordered

judgment so entered on the pleadings for the amount prayed for in the amended complaint; to which order the defendants duly excepted.

And because the above and foregoing does not appear in the record but is proper to be incorporated in a bill of exceptions, the same is hereby settled and allowed as defendant's bill of exceptions herein, all parties to the action consenting thereto.

14

In open court November 7th, 1902.

KIRTLAND I. PERKY,
District Judge.

Filed Nov. 7th, 1902.

In the Supreme Court of the State of Idaho, May Term, A. D. 1903.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN ET AL., Defendants and Appellants.

On an Appeal from the District Court of the Fourth Judicial District in and for Elmore County.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Ailshie to the effect that the judgment of the court below be reversed.

It is therefore considered, adjudged and decreed by the court, that the judgment of the district court of the fourth judicial district in and for the county of Elmore, in the above entitled cause be and the same hereby is reversed and the cause remanded to said district court for further proceeding in accord with the views expressed in the opinion filed in the cause. Costs are awarded to the appellants.

15

I, Sol Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify, that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 11th day of June, A. D. 1903, and now remaining of record in my office.

Witness my hand and seal of the court, affixed at my office, this 11th day of June, A. D. 1903.

[SEAL.] SOL HASBROUCK, Clerk.

Amended Complaint.

(Title of Court and Cause.)

The plaintiff complains of the defendant and alleges:

That at the times hereinafter mentioned, the defendants were copartners doing business under the firm name of Ormsby and Bown.

That during the times hereinafter mentioned and for a long time prior thereto, the plaintiff was and now is the owner and lawfully in possession of the following described real estate situated in Elmore county, State of Idaho, to wit: The north one-half of the southwest quarter of section fifteen and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen in township two north of range seven east of Boise-meridian, in said county and State.

That on the fifteenth day of April, 1902, and for a long time prior thereto and from said date to December, 1902, the plaintiff was residing in dwelling house owned by the above-named plain-
16 tiff situated upon the premises and lands of the plaintiff as hereinbefore in this complaint described, and that the plaintiff was during said time and is now the owner of about two hundred head of cattle that ranged near and around said above described premises.

That during the time aforesaid and between the fifteenth day of April, 1902, and the date of the commencing of this action the defendants were the owners of and in the possession of and chargeable with the care of one band of sheep consisting of from two to three thousand head.

That during the aforesaid times and between the 15th day of April, 1902, and the date of the commencing of this action the defendants and their servants, employees and agents carelessly, wrongfully and negligently permitted and allowed said sheep to graze within two miles of the dwelling house aforesaid of the said plaintiff and upon the Government lands around the premises of the plaintiff above described, contrary to the provisions of secs. 1210, 1211 of the Revised Statutes of Idaho.

That by reason of the unlawful, careless, wrongful and negligent act or acts of the said defendants and their employees, agents, and servants as aforesaid, unlawfully, carelessly, negligently, wrongfully and recklessly permitting and allowing said sheep owned by said defendant to graze within two miles of the dwelling house of the said plaintiff and upon the land surrounding the premises of said plaintiff mentioned as aforesaid said plaintiff has sus-
17 tained great damage, in that the grass and pasturage near and about plaintiff's premises and within two miles of said dwelling house of said plaintiff has been eaten and destroyed by said sheep belonging to the defendants, and the plaintiff's said cattle were thereby deprived of the grass and pasturage growing in and upon said lands which they otherwise would have pastured upon.

That said damages were entirely caused and occasioned by the unlawful, wrongful, act or acts, carelessness and negligence of the said defendants and their servants, employees and agents, and at the time and in the manner aforesaid.

That said damages sustained by the plaintiff as aforesaid were inflicted and ca used without fault and negligence on the part of said

plaintiff, who was at the said time, and in the manner aforesaid, exercising ordinary care and prudence.

That by reason of said injuries and damages to said plaintiff sustained as aforesaid, and in consequence thereof, said plaintiff has been injured in the sum of two hundred dollars.

Wherefore, plaintiff demands judgment against said defendants for the sum of two hundred dollars ($200) and for costs and disbursements incurred herein.

DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Duly verified.
Filed October 29th, 1903.

Demurrer.

(Title of Court and Cause.)

18 Come now the defendants and demur to the plaintiff's amended complaint filed herein, on the following grounds, to wit:

1. That said amended complaint does not state facts sufficient to constitute a cause of action:

2. That said complaint does not state any cause of action other than a violation of sections 1210 and 1211 of the Revised Statutes of the State of Idaho, and said sections are in violation of article XIV. of the amendments of the Constitution of the United States, in that their effect is to deprive the defendants of their property without due process of law and that they deny to defendants the equal protection of the laws.

Wherefore, defendants pray that they be not required to plead further to plaintiff's amended complaint, and that they recover their costs.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Filed October 29th, 1903.

Order Overruling Demurrer.

(Title of Court and Cause.)

In the case of Enos C. Walling *vs.* Charles Bown and L. L. Ormsby on the demurrer to the plaintiff's complaint, this court is precluded from entertaining any different view in regard to the validity of sections 1210 and 1211 of the Revised Statutes of this State, commonly known as the two mile limit law, from that heretofore expressed by the supreme court on appeals in similar cases.

19 This court is bound to follow the view expressed by the supreme court upon these two sections and the validity of the statute in regard to grazing sheep within two miles of a habi-

tation, and for that reason the demurrer in this case which seems substantially like the two cases already decided by the supreme court, must be, and it is overruled.

LYTTLETON PRICE, Judge.

Filed October 29, 1903.

Minutes of the Court.

MOUNTAIN HOME, IDAHO,
THURSDAY, Oct. 29th, 1903—10 o'clock a. m.

(Title of Court and Cause.)

This cause coming on to be heard on remititur from the supreme court, plaintiff filed amended complaint to which defendants filed demurrer which was argued and overruled as shown by order overruling filed this day, and defendants given forty-eight hours in which to answer complaint.

Whereupon the court adjourned until Friday, October the 30th, 1903, 10 o'clock a. m.

LYTTLETON PRICE,
District Judge.

(Minute Book No. 2, page 504.)

Judgment.

(Title of Court and Cause.)

Now on this 31st day of October, 1903, this cause came regularly on for hearing and Daniel McLaughlin appeared for the plaintiff but the defendants appear not; and it appeared to the court
20 that heretofore the said defendants had appeared herein and filed their demurrer to plaintiff's amended complaint and that on a previous day of this term of court said demurrer came regularly on for hearing and that upon such hearing the said demurrer was by the court after argument overruled to which ruling the said defendants then and there in due form excepted; and it further appeared to the court that said defendants were given forty-eight hours in which to answer but that hereafter they elected in open court to stand upon their said demurrer and it further appearing that the time for answer had expired and no answer had been filed, the default of said defendants and each of them was duly entered; whereupon in consideration of the premises and the law the court being duly advised in the same and upon motion of the plaintiff's attorney,

It is ordered, considered and adjudged that the plaintiff Enos Walling do have and recover of and from the said defendants Charles Bown and L. L. Ormsby judgment in the sum of two hun-

dred dollars and his costs of suit taxed in the sum of three and 90-100 dollars.

LYTTLETON PRICE,
District Judge.

In open court, Oct. 31, 1903.
(Filed October 31, 1903.)
Entered and recorded Nov. 4, 1903, at 2:15 p. m. Book 3, page 84.

21 Notice of Appeal.

(Title of Court and Cause.)

To Enos Walling, plaintiff; Daniel McLaughlin, attorney for said plaintiff, and to the clerk of the above entitled court:

You and each of you will please take notice that the defendants in the above entitled action hereby appeal to the supreme court of the State of Idaho, from the judgment therein entered in the said district court on the 4th day of November, 1903, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

WYMAN & WYMAN,
RICE & THOMPSON,
Attorneys for Defendants.

Service admitted by copy after filing this 20th day of November, 1903.

DANIEL McLAUGHLIN,
Attorney for Plaintiff.

Filed Nov. 20th, 1903.

Attorney's Certificate.

It is hereby stipulated by the undersigned, the attorneys of record for the respective parties hereto, that the foregoing transcript is correct, that it contains the judgment roll in the said action and that a good and sufficient undertaking in due form on appeal from the judgment entered on November 4, 1903, was filed herein on November 20, 1903.

RICE & THOMPSON,
WYMAN & WYMAN,
Appellant's Attorneys.
DANIEL McLAUGHLIN,
Respondent's Attorneys.

Service of the foregoing transcript admitted Nov. 28, 1903.

DANIEL McLAUGHLIN,
Respondent's Att'y.

22 In the Supreme Court of the State of Idaho.

ENOS C. WALLING, Plaintiff and Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Defendants and Appellants.
} Petition for Rehearing.

Come now the appellants herein and move the court for a rehearing, said motion being based on the following grounds, to-wit: The sole question involved upon this appeal is the constitutionality of those sections of the statutes of this State which are commonly known as the two mile limit law, being sections 1210 and 1211 of the Revised Statutes of Idaho. Appellants, who were defendants below, in all their several pleadings to the complaint herein have claimed that the law in question is in conflict with and repugnant to the Federal Constitution in that it denies appellants the equal protection of the law and deprives them of their property without due process of law. In other words, they claim that they are not liable under the facts set forth in the complaint in this action by reason of the immunity or protection given them by the above clauses of the Federal Constitution.

The questions here referred to were the only ones presented to this court upon this appeal by the appellants and the decision and judgment of the court in effect deny the claim made by appellants.

We do not feel that we can add anything in the way of argument or citation to that which has already been presented to your honors and by you held insufficient and accordingly we shall not attempt any restatement of appellants' argument and contention but desire merely in this formal manner to call to the attention of the court

23 the fact that appellants in this case and in this court have claimed and do now claim the protection of the clauses of the Federal Constitution herein referred to and that the decision of the court has been to deny them their claim; and that there is in this action and upon this appeal drawn in question the validity of the statutes of the State of Idaho herein referred to on the ground of their being repugnant to the Constitution of the United States and that the decision of this court in this case and upon this appeal is in favor of their validity.

We therefore ask that your honors grant herein a rehearing.

Respectfully submitted,

RICE & THOMPSON,
WYMAN & WYMAN,
Att'ys for Appellants and Petitioners.

Endorsed: Petition for rehearing. Filed March 12, 1904. Sol Hasbrouck, clerk.

24 Record Entries.

BOISE, IDAHO, January 11, 1904.

SUPREME COURT, State of Idaho, } ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, chief justice, Hon. Charles O. Stockslager, justice, Hon. James F. Ailshie, justice, and the officers of the court, when the following, among other proceedings were had, to-wit:

ENOS C. WALLING, Respondent,
vs.
CHARLES BOWN ET AL., Appellants. } No. 910.

Ordered: That this cause is set for hearing on January 14th, 1904.

January 12th, 1904, same cause, the following entry was made, to-wit: Upon request of attorneys this cause is reset for hearing on January 29th, 1904.

On January 29th, the following entry was made in said cause: This cause having been set for hearing on this day the same was called. John C. Rice and Frank T. Wyman appeared for appellants, and James H. Hawley for the respondent. After argument by said attorneys the cause was submitted and by the court ordered under advisement.

February 16, 1904, the following entry was made in said cause. This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Ailshie to the
25 effect that the judgment of the court below be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the district court of the fourth judicial district in and for the county of Elmore, in the above entitled cause, be and the same hereby is affirmed. Costs are awarded to the respondent.

APRIL 21ST, 1904.

The following entry was entered, to-wit: a petition for a rehearing of this cause having been heretofore filed, and the court having fully considered the same, now on this day the court delivered its decision to the effect that the petition be denied.

It is therefore, considered, adjudged and decreed by the court that the petition of appllants for a rehearing of this cause be, and the same is hereby denied.

Justice Stockslager dissents from said order.

26 In the Supreme Court of the State of Idaho, December Term, 1903.

ENOS C. WALLING, Respondent,
vs.
CHARLES BOWN and L. L. ORMSBY, Appellants.

Filed Feb. 29th, 1904. Sol. Hasbrouck, Clerk.

Stare Decisis.

1. When the beneficial results to be obtained by a departure from the construction and interpretation placed by this court upon a constitutional or statutory provision will not greatly exceed the disastrous and evil effects likely to flow therefrom, the court will decline to reopen those questions where rights and interests have become settled under such decisions and they have been acquiesced in by the legislature and the people for any reasonable period of time. (Syllabus by the court.)

Appeal from District Court in and for Elmore County; Hon. Lyttleton Price, Judge.

Action by plaintiff for statutory damages. Judgment for plaintiff and defendants appeal. Affirmed.

Rice & Thompson and Wyman & Wyman for appellants.

Daniel McLaughlin and Hawley & Puckett for respondent.

27 AILSHIE, *J.*:

This case was here for consideration once before (Walling *v.* Bown, 72 Pac. 960), and was remanded for further proceedings in accordance with the views there expressed. After the remittitur was sent down the plaintiff was allowed to file an amended complaint to which the defendants demurred. The demurrer was overruled and defendants failed to answer or make any further appearance, and such further proceedings were had on the part of the plaintiff, that, thereafter, a judgment was duly entered in favor of plaintiff. Defendants have appealed from the judgment which brings up the judgment roll alone for our consideration. The transcript apparently contains a history of the case from its inception in the justice's court, but the only matters properly here for our consideration are: the amended complaint, demurrer, order overruling demurrer and judgment. (Sec. 4456, R. S.) The record contains no certificate under sections 4819 and 4821, showing that any other papers were used on the hearing in the trial court. The question raised by the appeal is the constitutionality of sections 1210 and 1211, of the Revised Statutes, commonly known in this State as the "Two mile limit law."

Appellants in their brief say: "The facts of the case were fully understood and admitted by all the parties to the record. There never has been at any time any dispute as to what the evidence shows. The question has always been exclusively one of law * * * It will be seen that the admitted facts bring this action strictly within the terms of the statute."

Respondent refers to this statement contained in appellants' brief and affirms and reiterates it, and, in answer to the questions raised, cites: Seifers *v.* Johnson, 7 Idaho, 798; 65 Pac. 709 and Sweet *v.* Ballentine, 69 Pac. 995, both from this court, contending that these decisions have become the law of the State on the subject matter treated therein.

The issues, therefore, discussed by the respective parties on this appeal are these: Appellants urge the unconstitutionality of the two sections of the statute. Respondent relies on the doctrine
28 *stare decisis*. The latter proposition demands our attention first, and if applicable here, precludes our consideration of the former.

It is well enough to say here and now that while the personnel of this court has changed since the decisions above cited were announced, the principles of law have not changed, and we shall endeavor to apply them as they appear to us.

Now to our first inquiry. The doctrine of *stare decisis* is founded largely upon expediency and sound principles of public policy. (23 A. & E. Ency. of Law, 1st ed. 24.) It seems to be generally conceded that where the beneficial results to be obtained by a departure from the construction and interpretation placed by a court of last resort upon a constitutional or statutory provision will not greatly exceed the disastrous and evil effects likely to flow therefrom, courts should refuse to reopen such questions. This is the position which was taken by our supreme court in People *v.* Alturas County, 6 Idaho, 418; 55 Pac. 1067, where it was said in reference to a former decision holding a legislative act valid: "No good would be accomplished by overruling that decision, but much evil and confusion would result therefrom. Whether that decision was right or not, public policy and sound legal principle demand that we now adhere to it, and regard that question as a sealed book, which is no longer open to public scrutiny."

The reasons for this rule are illustrated in a practical way by the supreme court of Wisconsin in Fisher *v.* Horican Iron & Man'f'g Co., 10 Wis. 355, where it is said: "It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits, and the community has a right to expect, with confidence, we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally ever- six years, and if each change in the organization produces a change in the decisions, and a different construction of laws,

under which important rights and interests have become
29 vested, it is easy to see that the consequences will be most pernicious."

Following these reasons for invoking the rule here, let us examine the conditions now confronting us and determine whether, under the recognized and established rules of law, we would be justified in opening the question as to the constitutionality of these statutes for an original investigation and determination.

Sections 1210 and 1211 have been on the statute books of the Territory and State of Idaho since 1875. In June, 1901, they were construed and held constitutional by this court in Seifers *v.* Johnson, *supra.* In June, 1902, they were again considered and held valid and enforceable by the same court in Sweet *v.* Ballentine. In August, 1902, both political parties of the State met in conventions and each officially declared in favor of the law as construed by the court and pledged themselves to maintain the same on the statute books. Notwithstanding the declaration of both parties, the fight was carried into the campaign of the autumn of 1902, each party accusing the other of insincerity and juggling with the question. It became the burning an- paramount issue of that campaign. The legislature met in January, 1903, and remained in session sixty days, but no attempt was made to repeal or modify this law. On the other hand, bills were introduced, but never enacted, making it a penal offense to violate the existing law on the subject. These facts are a part of the public history of this State. During this period of more than two years and a half the various and respective interests and rights of settlers on the one hand and sheep owners on the other, as between themselves, have become fixed and settled, and conflicts and violence have ceased among them. To disturb this condition would be to invite recurrent strife, dangerous conflicts and endless confusion and discord among our citizens and alarm large industrial interests of the State without a single, apparent, good or beneficial result. The constitutional questions raised in this case were fully and ably presented in each of the former cases and seem to have
30 been elaborately considered by the court in the opinions. The issue made by appellants in this case is fully and clearly covered by those cases.

The writer of this opinion is of the belief that, whatever might be our judgment now, we would be wholly unjustified in opening these questions for further consideration by this court. If this subject is to again become the bone of contention in Idaho, it will have to come through either the legislature or a higher judicial tribunal than this.

Judgment affirmed with costs to respondent.

Sullivan, C. J. concurs.
Stockslager, J. dissents.

31 STOCKSLAGER, J. (dissenting):

I am unable to concur in the conclusion reached in this case. My associates state the two propositions presented by counsel for respective parties and decide the case on the doctrine of *stare decisis*. It is evident from the brief of appellant's counsel that they were anxious to have a decision on the constitutionality of the two sections of our statute in question in this case, from this court, as it is now constituted. It is equally evident from the brief of counsel for respondent that they were content with the former ruling of the court on the constitutional question, hence invoke the doctrine of *stare decisis*.

Having expressed my views in a former decision of this court as to the constitutionality of the law in question (Sweet *v.* Ballentine, 69 Pac. 995), I will only discuss the application of the doctrine of *stare decisis* as applied to the case at bar by my associates. I have no quarrel with the opinion as to the application of the doctrine of *stare decisis* in cases where property rights have attached or grown up under some existing law that has been declared valid by a court of last resort.

An examination of the former decisions of this court will disclose that when this question has been presented it has upheld the rule as above announced. In the case of People *v.* Alturas County, quoted approvingly by my associates in the majority opinion written by Mr. Justice Quarles as late as 1899, gives the reason why the former judgment of the court should not be disturbed: "It will thus be seen that more than two years ago this court held said act to be constitutional. Since then the people of these two counties, doubtless relying on the judgment of both the legislative and judicial branches of Government, have acted on the theory that said act was valid; and the former decision of the court having been acted upon by the people who have adjusted the business matters of the county, funded old indebtedness, and created new, should not be disturbed at this late day." Then follows the quotation from this decision in the majority opinion. Under the facts
in that case I think the writer very clearly and forcea-
32 announced the doctrine urged by counsel for respondent, and I am in full sympathy and accord with it. In that case the counties of Blaine and Lincoln had been organized out of the territory theretofore comprising Alta and Logan, and formerly Alturas county. Officers had been appointed and afterward elected for the new counties. The courts had been organized and recognized the new counties as political divisions of the State. New records had been procured for the two new counties and the old records transcribed into the new. All of the old indebtedness had been adjusted, new bonds issued and passed into the hands of innocent purchasers. Well it may be said that much confusion would follow the action of the court in disturbing conditions existing at the time of the attack on the former judgment of the court.

The case of Fisher *v.* Horicon Iron Mfg. Co. 10 Wis. 355, an extract from which appears in the majority opinion, is in harmony with the views expressed in People *v.* Alturas County. The syllabus in this case shows what question was before the court and the reason for the application of the rule announced in the opinion quoted by my associates: "When the supreme court of the State had decided that the 'act covering mills and mill dams' was constitutional, and right and interests have grown up and become vested under the law as then construed by the court, the court will now adhere to that ruling although all its members may be of opinion, if it were a new question, that the decision should have been against the constitutionality of the act." The fact that property rights had grown up under a former decision of the court seems to be the control-ing principle and the reason for adopting the rule of *stare decisis*.

In the 23rd A. & E. Ency. of Law, 1st ed. 24, referred to in the majority opinion, I quote the entire section, to-wit:

"4. Single decision and decision in series.—While a number of decisions seemingly corroborative of a previous one add strength to it and make it the more difficult to overrule or reverse it, mere numbers of cases upon the issue will not make the decision conclusive. Much more depends upon the opinion of the court and the emphasis placed upon the decision than upon the fact that any case
33 has been followed subsequently. For a variety of reasons, several cases similarly decided are stronger than one. There is less likelihood of error; any points, decisions, or statutes overlooked in the one may be considered in subsequent cases; and the case of reversing one decision is greater than the overthrow of a series. If there is but one case upon a point, and there seems no good reason for a reversal, that will ordinarily be taken as a fixed precedent. It is where there is a conflict of opinions or an evident error in the decision that a court will overrule one case, when it would hesitate more about condemning several. Much depends upon the importance of the decision and the weight to be attached to it. Whether the court is emphatic in its approval, whether the decision is one affecting or changing important interests, and whether it is expedient or good policy to sustain or overrule a particular decision, are questions which have much influence upon the court." It will be seen that the author, as in all the cases cited so far, ends his section with the announcement "whether the decision is one affecting or changing important interests." Note 1 to this section referring to Morse *v.* Goold, 11 N. Y. 285; 62 Am. Dec. 103, is as follows: "The effect of such judgment of affirmance rendered by a divided court is as conclusive upon the rights of the parties to the judgment as any other, although it is not considered as settling the question of law as to cases which may arise between other parties." Etting *v.* Bank of U. S., 11 Wheat. (U. S.) 59, furnishes some very instructive reading. It is an opinion by Chief Justice Marshall and is referred to by the author in his note 1 above referred to. These are the authorities

referred to in the majority opinion, and I assume are the foundation for the judgment.

I will now take up the other view of the situation as presented by the case at bar. In the 23rd A. & E. Ency. of Law, 1st ed. 36, under the head of "Limitations of the rule," the author says: "There are
certain limitations to this as to almost all rules. There are
34 clear and palpable mistakes of law which should be corrected,
especially when it can be done without injury to any person or property. If no injury or injustice would result to anyone, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and future and permanent good to the public is to be considered rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Whenever a correction can be made without working more harm than good, it should be done."

In Hart *v.* Burnett, 15 Cal., beginning at page 530 and ending at page 631, a very exhaustive opinion as well as instructive, at page 602, we find this significant language quoted from Chancellor Kent: "But I do not wish to be understood to press too strongly the doctrine of *stare decisis* when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear and reversed without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of the error."

Again it is said: "Even a series of decisions is not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending
upon the consideration of the importance of certainty in the
35 rule, and the extent of property to be affected by a change of it."

This case cites with approval the 25th Ala., 201, in the following language: "A series of decisions made and followed up from the earliest judicial times is binding upon the judges, but says that if those decisions be opposed to the State or Federal Constitutions, they would take pleasure in discarding them."

In Houghton *v.* Austin, 47 Cal. 646, we find another long, instructive case on the question at bar, and approves the case of Hart *v.*

Burnett *et al.*; at page 668, we quote: "The question of the conclusiveness of adjudications is not necessarily dependent upon the number of them. * * * We must give force to the qualifications expressed in the words 'settled,' 'acquiesced in,' and the like. They cannot mean 'settled' by the mere fact of the adjudications, for then there would be no use in the terms; they would be without meaning, for every judgment on a title would, on this construction, settle the law. * * * The rule itself implies that the doctrine protected by *stare decisis* cannot stand of itself. But it is a solecism to say that causes should be tried upon wrong principles—be decided against law—whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case, is for the court, as a matter of legal discretion, whenever the rule is invoked. No such rule ever existed as that a court should be absolutely bound by a previous decision. And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional rights of the citizen. One provision of the Constitution can impose no greater obligation than another. It may be that some time in the far distant future, a plain provision of the organic law may be temporarily lost sight of in the heat of a popular excitement. * * * There may be those who assume that the judges of this court are utterly ignorant of the spirit of the times in which we live; but we are willing to believe we have reached the condition of 'progress,' when it is supposed by persons, however in-
36 fluential, that judges are to be driven from carrying into judgment their conscientious convictions of what the law demands, by suggestions of public hostility, encouraged, perhaps, by those who affect to regret that the courts should place themselves in opposition to the prevailing sentiment. We are by no means convinced, however, that the people feel the intense affection for the sections of the Code which the parent entertains for his own bantling. There is a certain regard for the democratic idea which underlies all our institutions which the mere demagogue always fails to appreciate. It is based on the firm conviction that the masses of the people will ultimately understand that the violation of a constitutional privilege in the person of the humblest citizen, is a greater evil than any inconvenience which may be supposed to exist under the Government the people have solemnly adopted."

Again, in San Francisco *v.* Spring Valley W. W., 48 Cal. 493, we find this statement in the syllabus: "*Stare dicisis.*—Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the Constitution, it is better that inconvenience should be submitted to, rather than such a decision should stand, and a valuable provision in the fundamental law be obliterated."

In *Ex parte* Koser, 60 Cal. 177, at page 204, in discussing the application of the rule of *stare decisis*, the court say:

"Nor can the doctrine *stare decisis* be invoked to prevent us from inquiring into the constitutionality of the sections of the penal code. If, in *Ex parte* Andrews the act of 1858 was decided to be valid, in *Ex parte* Newman (9 Cal. 502), the same act was declared to be in conflict with the fourth section of the first article of the former constitution. In holding the sections of the penal code to be obnoxious to constitutional objection, we but return to the rule which, for more than three years, was the established rule in California. But if the case *Ex parte* Andrews stood alone—'No such rule ever existed as that a court should be absolutely bound by a previous decision.

37 And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional right of the citizen.' (Houghton *v.* Austin, 47 Cal. 666.)

The supreme court of Texas in a very elaborate and well considered opinion (Willis *v.* Owen, 43–41,) on page- 43–49, speaks in no uncertain terms as to the application of the doctrine of *stare decisis*: "This doctrine grows out of the necessity for a uniform and settled rule of property, and definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action, as that time and its continued application as the rule of right between parties demands the sanction of its error. Because, when a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals, and more injury result to society by a reversal of such decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered. The questions to be considered in these cases have no application whatever to the title or transfer of property, or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the Government, the limitation upon legislative and executive power, as safeguards against tyranny and oppression. Certainly, it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*."

This court in a very recent decision, published July 1st, 1903, written by Mr. Chief Justice Sullivan, and concurred in by Mr. Justice Ailshie (the writer took no part in the decision for the reason that the rights of the parties had been litigated before him while

38 sitting as a district judge), laid down the rule for the application of the doctrine of *stare decisis*. This being my first opportunity to express my views on the question that was at issue in that cause—Parke *v.* Boulware, 73 Pac. 19,—I now give it my full and unqualified approval. The facts as stated by the court were as follows: "This action was brought to recover $500.00 dam-

ages for an alleged wrongful destruction of certain dams alleged to have been situated in appellant's irrogating ditch, by means of which appellant raised water out of his said ditch onto his land for irrigating purposes, and also for a perpetual injunction restraining respondent from interfering with said dams and ditches or of the flow of the water therein. The defendants (who are respondents here) answered and denied that appellant or his predecessors in interest constructed the water channel claimed by him as a ditch and averred that the same is one of the natural channels of Cassia creek, through which water has from time beyond the memory of man ever flowed, and that said channel was known as the North fork or Cassia creek; that said channel had been used by respondents and their predecessors in interest for more than twenty years from Cassia creek to and upon their lands, and averred that the use of said channel by appellants had been in common with that of respondents; and denied that they had cut away and removed said dams or that they threatened to remove the same." The case was tried in the lower court, judgment entered, and appeal taken to this court, and on hearing reversed; another trial was had below judgment entered; another appeal taken, and upon the hearing the doctrine of *stare decisis* was sought to be invoked. The court said: "The doctrine of *stare decisis* is not applicable to this case. We cannot regard that rule as showing any application to this case. That rule or doctrine grew out of the necessity for a uniform and settled rule of property, and to form a definite basis for contracts and business transactions."

It would seem from all the authorities bearing on the question of the application of the doctrine of *stare decisis* that if property rights have grown up or have been settled under an existing de-
39 cision of the court of last resort, the judgment will usually be upheld. This is certainly the correct rule;—has been twice so declared by this court, and if it is shown in the case at bar that such a condition exists, then it should prevail here.

Are the reasons for the application of this rule sufficient? What property rights have grown up under these two sections of the statute? Does the fact that they have remained on the statute books since 1875 make them valid or give them special meaning; or is it because they were permitted to repose for a term of twenty-seven years before anyone attempted to enforce them that they are to be given new meaning or special vitality? Does the fact that the two political parties were seeking for an advantage give these sections force and validity? Does the fact that the legislature met in 1903 and did not repeal or modify this law give it additional strength; or is their silence on the subject to be so construed that the doctrine of *stare decisis* must be invoked and a new rule for the application of the doctrine established by this court? Does the fact that "bills were introduced making it a penal offense to violate the existing law on the subject" add force to the law or change the doctrine of *stare decisis?* It is true, as stated in the majority opinion, that "these facts are a part of the public history of the State," but does that add

force and validity to the law, or does it change the doctrine of *stare decisis?* If property rights have been settled or grown up since this law was first declared constitutional by a divided court in June, 1901, then there is some reason for the application of the rule invoked by my associates in the majority opinion. Did any one ever hear of the Government permitting property rights to attach to the public domain, excepting by proper entry under the land laws of the United States? It is as much a matter of public history that the Government will not permit an individual to fence the public domain and thus withdraw it from the use and benefit of the public as is the actions of the political parties in attempting to juggle with a statute and thus acquire a political advantage.

40 The constitutional rights of the people cannot be disposed of in this way, nor can the doctrine of *stare decisis* be invoked to accommodate the whims or caprices of either or both parties.

I cannot concur in the statement in the majority opinion as to the "respective rights and interests of settlers on the one hand and sheep owners on the other, as between themselves, have become fixed and settled." The court records show that a vast number of suits have arisen, three of them finding their way to this court. The dangerous conflicts we have had in this State have not been between the settlers and stock men, but between conflicting stock interests.

For the foregoing reasons, based on the decisions of all the courts, including the only two expressions of our own court, I do not believe the doctrine of *stare decisis* should control, and that appellants were entitled to a decision on the merits of the case.

41 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error, vs. ENOS C. WALLING, Defendant in Error. } Petition for Writ of Error.

Filed June 22d, 1905. Sol. Hasbrouck, Clerk.

Your petitioners, Charles Bown and Leander L. Ormsby, hereby set forth that on or about the 21st day of April, 1904, the supreme court of the State of Idaho made and entered a final decision and judgment herein in favor of the defendant in error and against Charles Bown and Leander L. Ormsby, plaintiffs in error, in which final decision and judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of said Charles Bown and L. L. Ormsby, plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said supreme court of the State of Idaho is the highest court of the State of Idaho in which a decision in this action could be had.

Wherefore, Charles Bown and Leander L. Ormsby, plaintiffs in error, petition and pray for a writ of error from said decision and judgment to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Boise, Idaho, June 22, 1905.

JOHN RICE,
FRANK WYMAN, AND
W. E. BORAH,
Boise, Idaho, Attorneys for Plaintiff in Error.

42 STATE OF IDAHO, Supreme Court, } ss:

Let the writ of error issue upon the execution of a bond by the said Charles Bown and Leander L. Ormsby in the sum of $500.00, said bond when approved to act as a supersedeas.

Dated, June 22, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme Court
of the State of Idaho.

43 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error, vs. ENOC C. WALLING, Defendant in Error. } Assignment of Errors.

Come now the above named plaintiffs in error and file their petition for a writ of error and say there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment:

1. That the supreme court of the State of Idaho in its decision and judgment erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action herein is based, being sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional and in violation of article XIV of the amendments of the Constitution of the United States in that the said statutes do and each of them does deprive these plaintiffs in error of their property without due process of law.

2. That the supreme court of the State of Idaho in its decision and judgment in the above entitled cause erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action herein is based, be-

ing sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional and in violation of article XIV of the amendments of the Constitution of the United States in that said statutes do and each of them does deny these plaintiffs in error the equal protection of the law.

3. The supreme court of the State of Idaho erred in holding and deciding that said sections 1210 and 1211 do not abridge the
44 privileges and immunities of citizens or of these plaintiffs in error as guaranteed by the fourteenth amendment of the Federal Constitution.

4. That in deciding said cause and rendering said judgment there was drawn in question the Constitution of the United States and the same was necessarily involved in the decision, and the supreme court of the State of Idaho would not have rendered its decision nor given judgment without deciding the same against the clain and right under said Constitution specially set up by these plaintiffs in error.

5. The supreme court of the State of Idaho erred in holding and deciding that the defendant in error was entitled to recover as damages or as a penalty the value of the grasses growing upon the public domain within two miles of his dwelling house eaten and destroyed by the sheep of the plaintiffs in error and that thereby plaintiffs in error were not and are not deprived of property without due process of law or denied the equal protection of the law as provided by the Constitution of the United States.

6. The supreme court of the State of Idaho erred in holding and deciding that said sections 1210 and 1211 do not unlawfully discriminate between those engaged in grazing sheep on public domain and those engaged in grazing other stock on said public lands.

Wherefore, Charles L. Bown and Leander L. Ormsby, plaintiffs in error, pray that the judgment of said supreme court of the State of Idaho be reversed and said court be ordered to cause said action to be dismissed, and for such other relief as these plaintiffs in error may be entitled to, and for costs.

JOHN C. RICE,
FRANK W. WYMAN,
W. E. BORAH,
Attorneys for Plaintiffs in Error, Boise, Idaho.

Indorsed: Assignment of errors. Filed June 22, 1905. Sol Hasbrouck, clerk.

45 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY, Plaintiffs in Error,
vs.
ENOS C. WALLING, Defendant in Error. } Bond.

Know all men by these presents, that we, Charles Brown and Leander L. Ormsby as principals, and James E. Clinton, Jr., and M. A. Reagan as sureties, are held and firmly bound unto Enos C. Walling in the sum of five hundred — ($500.00) to be paid to the said Enos C. Walling, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 22nd day of June, 1905.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the decision and judgment rendered in the above entitled action by the supreme court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

CHARLES BOWN,
LEANDER L. ORMSBY,
Principals.
JAMES E. CLINTON, JR.,
M. A. REAGAN,
Sureties.

[Endorsed:] Bond. Filed June 22, 1905. Sol Hasbrouck, clerk.

46 STATE OF IDAHO, } *ss*:
County of Ada, }

James E. Clinton, Jr., and M. A. Reagan being each duly sworn, depose and say: We are each of lawful age and are citizens of the State of Idaho, and know the contents of the foregoing instrument to which we have attached our names. We, each for himself say we are worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

(Signed) JAMES E. CLINTON, JR.
M. A. REGAN.

Subscribed and sworn to before me this 22 day of June, 1905.

[NOTARIAL SEAL.] JOHN J. BLAKE,
Notary Public.

The above bond is approved this 22 day of June, 1905.

CHARLES O. STOCKSLAGER,
Chief Justice of the Supreme
Court of the State of Idaho.

Endorsed: Bond. Filed June 22, 1905. Sol. Hasbrouck, clerk.

47 UNITED STATES OF AMERICA, ss:

The President of the United States to Enos C. Walling, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Idaho wherein Charles L. Bown and Leander L. Ormsby are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the supreme court of the State of Idaho this 22 day of June, 1905.

CHAS. O. STOCKSLAGER,
Chief Justice of the Supreme
Court of the State of Idaho.

Witness:
SOL. HASBROUCK,
Clerk of the Supreme Court.

48 BOISE, IDAHO, June 24, 1905.

The undersigned, attorneys for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HAWLEY, PUCKETT & HAWLEY,
Attorneys, for Enos. C. Walling, of Record in the
Supreme Court of the State of Idaho.

49 BOISE, IDAHO, June 24, 1905.

The undersigned, defendant in error in the above entitled cause, hereby acknowledges due service of the above citation and enters an appearance in the Supreme Court of the United States.

ENOS C. WALLING.

50 In the Supreme Court of the State of Idaho.

CHARLES BOWN and LEANDER L. ORMSBY,
Plaintiffs in Error,
vs.
ENOS C. WALLING, Defendant in Error.
} Certificate of Clerk.

I, Sol Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 14 day of July, A. D., 1905.

[Seal of Supreme Court, State of Idaho.]

SOL. HASBROUCK,
Clerk of the Supreme Court, State of Idaho.

Endorsed on cover: File No. 19,851. Idaho supreme court. Term No. 349. Charles Bown and Leander L. Ormsby, plaintiffs in error, *vs.* Enos C. Walling. Filed July 21st, 1905. File No. 19,851.

Office Supreme Court U. S.
FILED
OCT 19 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 381.

CHARLES BOWN AND LEANDER L. ORMSBY,
PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING.

BRIEF FOR PLAINTIFFS IN ERROR.

W. E. BORAH,
FRANK T. WYMAN,
JOHN C. RICE,
Counsel for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18738

(19,851.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 349.

CHARLES BOWN AND LEANDER L. ORMSBY,
PLAINTIFFS IN ERROR,

vs.

ENOS C. WALLING, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This appeal involves the validity or constitutionality of the following sections of the statutes of the State of Idaho:

"SECTION 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling-house of the owner or owners of said possessory claim.

"SECTION 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Under the provisions of the statute the defendant in error, Enos C. Walling, commenced his action in the probate court of Elmore county against the plaintiffs in error, alleging violation of said sections of the statute in the grazing of sheep, and claiming damages in the amount of $200. The pleadings were afterwards amended, and, as the issues were finally presented, directly presented the sole question of the constitutionality or validity of said sections of the statute above referred to. The district court found in favor of the plaintiff (defendant in error). The case was appealed to the district court, where judgment was again entered in favor of the plaintiff. The cause afterwards went to the supreme court, and the judgment of the lower court was affirmed. Petition for rehearing was presented and denied (Transcript, pages 15, 16, 17, 18, and 19). Writ of error has been allowed to the supreme court of the State of Idaho, and, as will be observed from the assignments of error, the only matters presented are those relating to the validity or unconstitutionality of the sections of the statute above quoted.

ASSIGNMENTS OF ERROR.

We assign as errors of the supreme court of the State of Idaho—

First. That the court erred in affirming the judgment of the court below for the reason that the statutes of the State of Idaho upon which the cause of action is based, to wit, sections 1210 and 1211 of the Revised Statutes of the State of Idaho, are each of them invalid and unconstitutional, in that they are in violation of article 14 of the amendments of the Constitution of the United States, in that said statutes deprive the plaintiffs in error of their property without due process of law.

Second. That said statutes of the State of Idaho upon which the cause of action is based are invalid and unconsti-

tutional, in that they are in violation of article 14 of the amendments of the Constitution of the United States, as they deny to the plaintiffs in error the equal protection of the law.

Third. That said sections of the statute above referred to are invalid and unconstitutional, in that they abridge the privileges and immunities of citizens or of the plaintiffs in error as guaranteed by the fourteenth amendment of the Federal Constitution.

Fourth. That the supreme court would not have rendered its decision without deciding against the claim of the plaintiffs in error to the effect that said sections of the statute are unconstitutional.

Fifth. That the supreme court erred in holding that the plaintiff in said action was entitled to recover as damages or as a penalty the value of the grasses growing upon the public domain and alleged to have been eaten and destroyed by the sheep of plaintiffs in error, and that by so holding the plaintiffs in error were deprived of their property without due process of law and denied equal protection of the law.

Sixth. That said sections of the statute, 1210 and 1211, unlawfully discriminate between citizens engaged in sheep grazing on the public domain and those engaged in grazing other classes of stock upon public land.

ARGUMENT.

This is a peculiar and extraordinary statute. We have not been able to find its like, either in letter or spirit, elsewhere. It remained upon our statute books from 1875 until 1901 practically a dead letter, as no actions were ever had under the same. It carries upon its face an arbitrary discrimination against a legitimate industry. It has been sustained by our court (Judge Stockslager dissenting) upon the theory that it is within the police power of the State. If it be within the police power of the State, it seems difficult to foretell how far the State legislature would be permitted to go in its fanciful and arbitrary discriminations against any legitimate industry. It will be observed, too, that in sustaining this law the State court has held that as an element of damages the complaining party may recover the value of the grass growing upon the public domain and within two miles of a residence which may have been eaten or destroyed by sheep, although this grass unquestionably belongs to the public or the Government. We call attention to these decisions of the supreme court of the State of Idaho construing this statute and upholding it. By reference to these opinions it will be seen that the court has gone to the full extent of holding the act constitutional and given full effect and scope to its object and purpose. Under the holdings of the court the man who owns sheep may not go upon the public domain within two miles of any one's house, although a man owning any other kind of stock may graze up to his door. Under the holdings of the court if a man's sheep eat the grass from the public domain he is liable to his neighbor within two miles for the value thereof, although if the horseman or the cattleman destroys it he is not liable to any one for the value thereof.

Sweet *vs.* Ballentyne, 8 Idaho, 431.
Walling *vs.* Bown *et al.*, 72 Pac., 960.
Phipps *vs.* Grover, 75 Pac., 64.
Walling *vs.* Bown, 76 Pac., 318.
Spencer *vs.* Morgan, 79 Pac., 459.

Police Power.

Does the act in question come within the police power of the State? We may concede, as was said by our supreme court in the case of Seifers *vs.* Johnson (7 Idaho, 798): "The police power of the State is very great." Yet there are certain well-defined limitations which attach even to the exercise of this power, some of which, it seems to us, are manifestly violated by this statute. This power is not subject, perhaps, to any definite or exact definition. As was said by Justice Miller:

> "This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it rests the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property."
>
> Slaughter-house Cases, 16 Wallace, 32.

It should be borne in mind in the first instance that this statute is dealing with an industry recognized as a legitimate industry. Under the laws of the State sheep-raising and sheep-grazing are not as yet criminal *per se*, and any law resting upon the police power of the State and depending for its validity upon such power must distinguish at all times in its interposition or interference between doing things which are criminal *per se* and industries which are recognized as rightful and important industries of the State, constituting a basis for legitimate wealth within the State. The State may go to any limit almost in dealing with persons when they are doing things which are a nuisance *per se* or pursuing avocations which are hurtful or criminal *per se*, but the law must stop on the hither side of the destruction of property or unnecessarily interfering with the pursuit of an industry unless the destruction or interference is absolutely essential to the peace, health, and morals of the com-

munity, and based upon real and actual distinctions and not upon arbitrary or fanciful distinctions. If a law in making these classifications and drawing these distinctions is based upon no well-defined distinctions or differences as a matter of fact, it will not be construed as a valid law or within the police power of the State. In other words, any distinctions in classifications which are made with reference to property or different industries or in placing limitations upon the pursuit of industries must be founded upon real distinctions and differences existing in fact. Burdens imposed upon legitimate and rightful industries and interfering with the full enjoyment of property or denying to certain people privileges which belong to others cannot be had except as a result of real distinctions or differences and such as are well founded in fact. As said by Justice Brewer in the case below:

"But it is said that it is not within the scope of the 14th amendment to withhold from the States the power of classification and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subject or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed *and can never be made arbitrarily and without such a basis.* When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely *personal and arbitrary power.* No duty rests more imperatively upon courts than the enforcement of those constitutional provisions intended to

secure that equality of rights which is the foundation of their government."

Gulf, Col & S. F. Ry. Co. *vs.* Ellis, 165 U. S., 150.

In this connection we call particular attention also to the following language of the Supreme Court:

"Though the law itself be fair upon its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo *vs.* Hopkins, 118 U. S., 220.

"To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interest of the public generally as distinguished from those of a particular class requires such interference, and second, that the means are reasonable and necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

Lawton *vs.* Steele, 152 U. S., 133.

Mr. Cooley says:

"The doubt might also arise whether the regulation made for any one class of citizens entirely arbitrary in its character and restricting their rights, privileges or legal capacities in a manner before unknown to the law would be sustained. Distinctions in this respect should be based upon some reason which renders them important, like the one of capacities in infants and insane persons. But if the legislature should undertake to provide that persons following the same specified lawful trade or employment should not have capacity to * * * *make such use of the property as was permissible to others* it can scarcely be doubted that the act would transcend the due bounds of legislative power

even if it did not come with the conflict of an express constitutional provision. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness."

Cooley, Constitutional Limitations, page 391, 1 ed.
People *vs.* Gilson, 109 N. Y., 389.

In the case below there was involved a statute with reference to furnishing water for tenement houses, and the language used by Judge Peckham seems appropriate here:

"The act must be sustained, if at all, as an exercise of the police power of the State. It has frequently been said that it is difficult to give an exact definition which shall properly limit and describe such power which must be exercised subject to the provisions of both Federal and State constitution, and the law passed must tend in a degree that is perceptible and clear toward the preservation of the lives, the health or the morals or welfare of the community. All acts must tend in some appreciable or clear way toward the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of police power. It must not be exercised ostensibly in favor of the promotion of some such object while it really is an evasion thereof and for distinct and totally different purposes."

Health Department *vs.* Rector, 145 N. Y., 32.

In the case below it is said, in speaking of the fourteenth amendment, that it was intended "not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than laid upon others in the same calling and condition."

Barbier *vs.* Connelly, 113 U. S., 27.

Justice Stockslager in the dissenting opinion of Sweet *vs.* Ballentyne, 8 Idaho, 431, said:

"It has never been held and it would be not only new but a dangerous precedent to hold that under the pretense of police regulation you could give to one citizen an advantage over another in the mere matter of the use of the public domain or in the matter of general privileges and advantages."

"If a statute purporting to have been enacted to protect the public health, public morals or public safety has no real or substantial relation to those things or is a palpable invasion of rights secured by fundamental law, it is the duty of courts to so judge and thereby give effect to the Constitution."

Ex Parte Whitewell, 19 L. R. A., 729.

As bearing upon this subject and further elucidating the principles for which we contend we invite the court's attention to

In re Jacobs, 50 Am. Rep., 636.
State *vs.* Speyer, 29 L. R. A., 573.
Sutton *vs.* State, 33 L. R. A., 589.
Cotting *vs.* Kansas City S. Y. Co., 183 U. S., 79.
Connelly *vs.* Union S. P. Co., 184 U. S., 540.

In the light of these authorities we may again look at the statute in question.

"It is not *lawful* for any person * * * to herd the same (sheep) within two miles of the dwelling-house."

It will be noticed that this statute makes it unlawful to herd sheep within two miles of a dwelling-house, although the two miles may be covered entirely by range upon public lands or by lands covered by the individual who may own the sheep. The public range or the open commons may be used by all other men engaged in a similar business of stock-raising or stock-grazing and is not denied to horses or cattle. Upon what real distinction, upon what difference founded in

fact, is this discrimination based? Why is the sheep-owner denied the privilege given to every other stock-raiser? Is it because the morals, peace, or welfare of the community at large is involved, or is it but the arbitrary interference with a particular legitimate industry? Is it within the police power of the State to say that horses or cattle may come within any distance of a residence, but that it is unlawful to bring sheep within a certain distance? If so, upon what is the distinction based? As yet none has been suggested. All other stock-raisers and stockmen may use the public domain or commons, but if the sheep-owner uses it at certain places or within certain limits he is liable for damages. Suppose that the legislature had said that horses should be ostracized instead of sheep, and that their close company was no more desirable than that of sheep, would not such discrimination be equally as valid as that one in question? Does not this statute, in other words, in the language of Mr. Cooley, "provide that persons following the same specified lawful trades or employments should not have capacity to make such use of the property as was permissible to others"? All stock-raisers and all parties engaged in the stock-raising industry have the privilege and permission to use the commons except the man engaged in the stock-raising of sheep.

As we have seen by the case of Yick Wo *vs.* Hopkins, *supra*, we are permitted to consider the application and administration of the law by public authority in determining the question of whether or not it rests with unequal force or makes unjust or illegal discriminations between persons. The supreme court of Idaho, in upholding and construing this law (Sweet *vs.* Ballentyne, 8 Idaho, 431), has said that the resident may recover against the sheep-owner the value of the grass growing within two miles of his residence, although this grass may be upon public domain; that the value of this grass is an element of damage. In other words, if the sheep-owner's herd eats and destroys grass belonging to the public and growing upon the public domain and the

use of which the entire public is entitled to, the resident may recover the value thereof. But if the owner of horses or cattle permits the horses to graze upon such grass so growing upon the public domain and within two miles of the residence, no liability attaches, nor is he liable for the value thereof to any one. It is certainly clear to all that this grass does not belong to the resident or to any other particular stockman. They have no property interest in it in the sense that they may claim it to the exclusion of any one else. Yet here is a statute by which the resident may sue and recover the value of that which does not belong to him, in which he has no property interest, and to which he has a right in common with every one else. It belongs to the Government, which by license all are permitted to enjoy; yet, as the statute is now construed, the resident is given a property right therein, and as one of the unjust features of this law he may make the sheep-owner liable for the value thereof when no other citizen of the State can be made so. In other words, the man who owns sheep may go within two miles of a man's residence, cut and haul away and appropriate unto himself and feed to his sheep all the grasses if the feeding takes place more than two miles away, and the resident cannot complain and cannot recover for the value thereof. But if, instead of cutting the grass and taking it away, he takes his sheep with him and they eat it, it immediately becomes the property of the resident, and he is entitled to sue for the value thereof. Is this in any sense a police regulation? Does it have anything to do with the peace, moral quietude, and safety of the public? Is it not a fanciful discrimination upon the part of the legislature which, commencing here, may end anywhere that their curiosity may carry them in the realm of legislative fancy? "Classifications when made must be based upon some real or substantial difference which of itself naturally makes the distinction."

It was said in one of the opinions of the Supreme Court that the smell of the sheep might be offensive to some people.

True enough, and so might cologne. To carry a little further the illustration used by Justice Brewer, a black man might be offensive to some people, and thereby he might be visited in the mind of the legislature with the liability to pay an attorney fee when sued, while a white man should not be so charged. But that would hardly be such a distinction as the fundamental principles of our Government require in order that a legitimate industry may be interfered with. But suppose we admit that the smell may be offensive. Yet this ought not to carry with it the right to recover the value of the grass upon the public domain. The statute, as construed, not only says that the sheepmen may not come within two miles, but if they do come and eat the grass they are liable for the value thereof, while no one else is. It is not shown nor is it pretended that the grazing of sheep affects the health of the resident, nor does it disturb his peace or quietude.

The policy of the United States as to the public lands not only permits but encourages their use for the purpose of pasturing of all kinds of live stock. In the case below Justice Miller said:

"We are of the opinion that there is implied licence growing out of the custom of nearly a hundred years that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of Government forbids this use. * * * The Government of the United States in all its branches has known of this use and has never forbidden it or taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the Government, and as we shall attempt to show, with its direct encouragement. * * * The owner of a piece of land who had built a house or enclosed 20 or 40 acres of it had the benefit of this universal custom as well as the party who owned no land. Everybody used the open, unenclosed common which produced nutritious grasses as a public common

on which their horses, cattle, hogs and sheep could run and graze.

"It has never been understood that in those regions and in this country in the progress of its settlement the principle prevailed that a man was bound to keep his cattle confined within his own ground or else would be liable for their trespasses upon unenclosed ground of his neighbors."

Buford *vs.* Houtz, 133 U. S., 320.
Kelley *vs.* Rhoades, 188 U. S., 1.

The supreme court of Idaho has said: "The common-law rule that a man must confine his own domestic animals to his own enclosure has never obtained in this State."

Johnson *vs.* O. S. L. Ry. Co., 63 Pac., 112.

It should be borne in mind, therefore, that the stock in this country of all kinds is not upon the public domain as trespassers, but the stock is there, of whatever kind or nature, without discrimination or restriction and by reason of the positive right recognized as such by the executive, legislative, and judicial departments of the Government. All are encouraged alike and in the same measure.

Again, why this particular limit of two miles—this arbitrary fixing of a distance? Is there any reason why it should be unlawful to herd sheep within two miles and lawful to herd them two miles and a quarter? In other words, upon what does the legislature base its right to fix an arbitrary distance? Is there any distinction to be made or reason to be given why it is contrary to the morals, the peace, the health, and quietude of the community to have sheep kept at this arbitrary distance of two miles? What reason can be assigned in law or in fact, if this law is constitutional, why the legislature should not amend it and say four miles, which would practically drive sheep from the range? We are now simply discussing the power of the legislature to say two miles, for if they have that power they have the power to say four miles. "One legislative interference is but the length of a long chain of repetitions;

their subsequent interference being naturally produced by the effects of the preceding" (Federalist, No. 44). Whether the grazing of sheep in the vicinity of a man's house is injurious from a standpoint of health or sanitary or peace regulation is entirely dependent upon other questions than that of distance. As was said in the case of State *vs.* Speyer, *supra:* "It cannot be said that all pig-pens situated within one hundred feet of a well or spring of water used for drinking purposes or within one hundred feet of a store or inhabited house are injurious to public health." To illustrate: Suppose A is ranging sheep at the foot of a mountain range or high range of hills. On the opposite side dwells his neighbor. The watershed runs in an opposite direction from the watershed where the sheep graze. The neighbor's cattle are upon a different range. The sheep, therefore, so far as their effect upon the neighbor is concerned, his health, his peace of mind, do not affect him any more than if under other conditions they were ten miles away. On the other hand, if the sheep were upon the source of a stream or above the resident upon his immediate range, if they could be said to affect him at all they would do so a great deal more at a distance of five miles away than under other circumstances at a distance of two miles. This law therefore makes this distinction, which does not exist in fact and has for its basic principle a purely arbitrary and unreasonable limitation, which upon the same theory exactly might just as well be extended to four miles or any other distance. But all these matters with reference to the herding of sheep within a certain distance of a man's house must apply just the same to horses and cattle and hogs, and any law which would be good must treat every grazer, stockholder, or user of public range alike.

The objections to the validity of the law here urged were all presented for the consideration of the State court, and the State court held against the plaintiffs in error upon all these

matters. We are therefore fully within the rule and entitled to have the questions reviewed and passed upon here.

In presenting this matter in the brief we have argued the assignments of error collectively for the reason that they are closely allied and thoroughly interwoven one with another. But both in the record and in the brief we have endeavored to specify clearly and separately the different reasons why we think the law unconstitutional.

In conclusion, we urge that the statute in question, which has been sustained by the State court, deprives the plaintiffs in error of their property without due process of law; that it denies to them the equal protection of the law; that the interest which the legislature has apparently sought to protect is a private interest; that the classification which the legislature seeks to make is between kinds of property and between parties engaged in the same business between which there is no distinction in principle or no difference in fact; that the act fixes an arbitrary limit without regard to the facts or the existence of the interest to be protected or the real conditions surrounding the industries; that the State law does not operate generally in its application, nor does it embrace all persons or all classes under substantially similar circumstances; that said law attempts to create a distinction arbitrary and unfounded, and that in the interpretation of the law and in the enforcement of the same as construed by the courts it is made to affect unfairly and unequally those engaged in a legitimate business.

Respectfully submitted,

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Counsel for Plaintiffs in Error.

Supreme Court of the United States

October Term, 1906.

CHARLES BOWN AND LEANDER L. ORMSBY, *Plaintiffs in Error,*
vs.
ENOS C. WALLING. } No. 81.

ORLANDO F. BACON, *Plaintiff in Error,*
vs.
PAUL H. WALKER, CHARLES G. WALKER, EUGENE WALKER, AND GILBERT WALKER. } No. 147.

In Error to the Supreme Court of the State of Idaho.

Brief for Plaintiffs in Error.

STATEMENT.

Case No. 81, having been postponed to be considered with No. 147, as one case, we will consider them together.

Both cases are based upon the following Statute of Idaho:

"Section 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or

> permit them to be herded on the land or possessory claim of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim.
>
> "Section 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Both cases originated in the Courts of Justices of the Peace and were appealed to the District Court and finally to the Supreme Court of the State, where both were decided against the plaintiffs in error and were brought to this court on writs of error to that court.

The constitutionality of the act was properly raised in both cases and that is the only question involved in the cases here.

The statute was enacted in 1875, but no effort was made to enforce it until 1901. It was sustained by the Supreme Court (Judge Stockslager dissenting) as a proper exercise of the Police Power. This, then, is the real question involved, to the discussion of which we will now address ourselves.

ARGUMENT.

Police Power.

Black on Constitutional Law, p. 334, thus defines Police Power:

> "There is in every sovereignty an inherent and plenary power to make all such laws as may be necessary and proper to preserve the public security, order, health, morality and justice. This power is called the Police Power."

This general definition seems to be broad and sweeping and yet courts have found great difficulty in giving it anything but a general definition. As was said by Mr. Justice Miller in the Slaughterhouse Cases (16 Wall., 32), "This power is and must be from its very nature incapable of any very exact definition or limitation." Nevertheless, most of the duty of the courts in connection with this power has been performed in efforts to keep its exercise within reasonable limits. It will be conceded, we think, that the tendency in legislative bodies called upon to exercise powers unlimited, except by their own judgment of what is best for the general welfare, is, to go to unreasonable and sometimes arbitrary lenghts in its exercise. It is, in such cases, the duty of the courts to step in and prevent such an exercise of this, when properly exercised, very beneficent and necessary power.

The courts were slow to interfere where the legislature of a *state* passed laws which it considered fell within this power and which were deemed by it best for the "public security, order, health or morals" of its people, for the reason as it was argued "the legislature acts upon its constituents," which was considered a sufficient safeguard against unreasonable or arbitrary acts. But while slow to reach the point of placing limits upon the unreasonable, or arbitrary exercise of this power, it is now well settled that it will be exercised in all proper cases.

Freund in his work on Police Power, at p. 139, after referring to and quoting from the decision of Matter of Jacobs (98 N. Y., 98), wherein the court declared an act of the legislature prohibiting the manufacture of cigars or other preparations of tobacco on any floor of a tenement house used for the purpose of living, sleeping, cooking, or doing household work, therein, which was entitled an "act to improve the public health," says:

> "Assuming the sanitary object to have been colorable, there was no valid ground to support the act, and *the chief interest of the case* must be found in the fact that the *Court undertook to override the legislative judgment*, which conceivably might have been based upon sufficient evidence."

In the case Gulf Col. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150, Mr. Justice Brewer speaking for the court upon this point said:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. No duty rests more imperatively upon courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of their government."

In Lawton vs. Steele, 15 U. S., 133, this Court, Mr. Justice Brown delivering the opinion, it is said:

> "The legislature may not, under the guise of protecting public interest, arbitrarily interfere with public business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its *determination as to what is a proper exercise, of its Police Power is not final or conclusive*, but is subject to the supervision of *the courts*.

Limitation of Police Power.

Having seen that the courts will interfere in a proper case, the next question is, in what class of cases and to what extent will the courts limit this power.

Tiedman in his work on State and Federal control of persons and property, at p. 505, thus states the doctrine:

> "The Police Power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare, in other words, to prevent the infliction of any public injury. The principle thus enunciated is the key to every problem arising out of the exercise of police power. Applied to the question of prohibition of trades or occupations it declares unwarranted by the constitution any law which prohibits altogether an occupation, the prosecution of which does not necessarily and because of its unwarranted character, work any injury to the public."

Freund on Police Power, at p. 138, states it as follows:

> "The restraint must not be disproportionate to the danger. This is simply an application of the principle that every exercise of the Police Power must be reasonable, a principle long since enforced as against municipal corporations, but also beginning to be recognized as binding on the legislature. Thus in Toledo, etc., R. Co. vs. Jacksonville (67 Ill., 37), an ordinance was set aside requiring the R. R. Co. to keep a flagman at every street crossing, even where traffic was very light."

Again at p. 482:

> "When the calling is not dangerous to the public either directly or indirectly, it can not be subjected to any police regulation whatever, which does not fall within the power of taxation."

Under the head of Classifications and Discriminations, p. 705, the same author says:

> "Under the head of particular burdens a number of cases have been discussed in which the justification of

police legislation was questioned on the ground that there was not sufficient casual connection between the right impaired and the public danger sought to be avoided. Much more frequent are the cases in which, while the connection is conceded, it is objected that the restraint is imposed upon some while others who are in a similar position are arbitrarily exempted from it. This objection involves the question of the validity of class legislation, and, in so far as it can be successfully maintained constitutes one of the most effectual limitations upon the exercise of the police power. The legislative discrimination which is thus questioned may be based on time, or locality, or personal status, and on difference of acts or occupations."

And in summing up this branch of his subject, p. 738, he says:

"Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the class omitted; and when the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great benefits. The decisions of the Supreme Court of the U. S. seem to be in accordance with these principles."

See in support of the same doctrine the cases of Barbier vs. Connelly, 113 U. S., 27; Connelly vs. Union Sewer Pipe Co., 184 U. S., 540; Gulf, Col. & S. F. Ry. Co. vs. Ellis *supra;* Lawton vs. Steele, *supra.*

Bearing in mind these limitations upon this power, let us consider the statute in question.

The first section makes it unlawful for any person to herd or graze sheep within two miles of the dwelling house of the owner of any possessory claim, and the second section gives the owner of such possessory claim a right of action for damages sustained, and for a second and every subsequent offense double damages.

In the case of Bown vs. Walling, No. 81, the defendant in error, plaintiff below, alleged in his complaint (Record, p. 9), that the offense complained of was committed "upon the government lands around the premises of the plaintiff."

In neither of the cases was it claimed that the plaintiff had any right, title, interest or claim of any kind whatsoever in or to any of the lands upon which the sheep were herded or grazed and for which the parties were awarded damages, but they relied solely upon the statute making it unlawful to so herd or graze sheep within two miles of the dwelling houses on their possessory claims. We thus have the question squarely presented, whether the legislature can in this manner discriminate against a long established and legitimate industry, and, in effect, except from the operation of the law all others engaged in similar industries, when it is not dangerous, or more dangerous than the excepted classes to the health, comfort or welfare of the people. Connected with this question also is that of the right of the legislature to arbitrarily give the owner of a dwelling-house on a possessory claim, the right to recover damages for herding or grazing sheep upon the lands of the United States, in which he has no claim whatever, as provided in the statute in question.

In Bedford vs. Houtz, 133 U. S., 320, Mr. Justice Miller said:

> "We are of the opinion that there is implied license growing out of the custom of nearly a hundred years

that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of the government forbids this use. * * * The Government of the United States in all its branches has known of this use and has never forbidden it or taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of government, and as we shall attempt to show, with its direct encouragement. * * * The owner of a piece of land who had built a house or enclosed 20 or 40 acres of it had the benefit of this universal custom as well as the party who owned no land. Everybody used the open, unenclosed common which produced nutricious grasses as a public common on which their cattle, hogs, and sheep could run and graze.

"It has never been understood that in those regions and in this country in the progress of its settlement the principle prevailed and the man was bound to keep his cattle confined within his own ground or else would be liable for their trespass upon unenclosed ground of his neighbors."

This case was cited in the case of Kelly vs. Rhoades, 188 U S., 1, the court in that case holding that Kelly in driving his sheep through Wyoming "was at liberty to consider the fact that he was licensed to make use of the public lands of the United States, without charge for the sustenance of his sheep."

The common-law rule that a man must confine his own domestic animals to his own enclosure has never obtained in Idaho.

Johnson vs. O. S. L. Ry. Co., 63, Pac. 112.

The subject naturally divides itself into three heads:

1. Is any restriction by the State of Idaho upon the herd-

ing or grazing of sheep upon one's own land, or upon the lands of the United States, reasonable?

2. If it is, is the limit of two miles fixed by the statute in question arbitrary and unreasonable, and

3. Is it an unreasonable and therefore unwarranted discrimination against the sheep industry and in effect in favor of all other similar industries.

We will take up these questions in the order above stated.

No Restriction Warranted.

We have seen that when a calling is not dangerous to the public, either directly or indirectly, it *can not be subjected to any police regulation whatever* which does not fall within the power of taxation. Freund on Police Power, *supra.*

It will hardly be contended that the herding or grazing of sheep is, of itself, dangerous to the public, either directly or indirectly. This being the case, it is difficult to see upon what ground the legislature would have the right to restrict the industry. It is an old and well established industry in many parts of the United States and particularly so in the State of Idaho, and as held by the courts, "unless it portends immediate danger, the courts will not readily acquiesce in the plea of safety to health."

Will it be said that it is offensive? If so, we answer in the language of Freund on Police Power, Section 178, that,

> "The offensiveness must as a rule consist in actual physical discomfort, or in violation of the sense of decency; mere undesirableness by reason of social or other prejudices is not sufficient, not even if it leads to a depreciation of property."

II.

The Two-Mile Limit.

But even if it were conceded (which it is not), that herding or grazing sheep in very close proximity to a house might be offensive, the next question is, whether there is any reason for the arbitrary limit of two miles. The homestead on the public lands is 160 acres, which, under the government surveys is one half mile square. It follows that, if one possessory claimant had his house on, or near the line of his claim adjoining that of his neighbor, he, the neighbor, might be prohibited under this statute from grazing his sheep on any part of his own land; for as above stated, no part of his claim would be two miles from his neighbor's house. Again, can there be any good reason urged why grazing should be permitted within the smallest fraction *over* two miles and not *within* that limit. The limit is not based upon reason, and is, therefore arbitrary, unjust and unlawful.

Tiedman on State and Federal control of persons and property, p. 556, says:

> "The nature of the business must also be such as to justify restriction as to locality. If the business is of an unoffensive character and its prosecution does not involve the creation of a nuisance, a law is unconstitutional which undertakes to confine it to a certain locality."

See also New York Sanitary Utilization Co. vs. New York City Health Department, 61, N. Y., Appl. Cited in vol. 8, C. Y. C., p. 1061.

Discrimination.

This brings us to the last question, viz, why the sheep industry was singled out from that of grazing cattle, horses, hogs or the raising of poultry?

Is this discrimination based upon any difference in these industries which would make one amenable to restrictions under the police power and not the other? Certainly the grazing of hogs is not less offensive than the grazing of sheep. Is there more danger to the public "health, comfort, security, order or morality," from the herding or grazing of sheep than of the classes of animals and fowls above enumerated? What are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted, entirely free from such danger, or do such exceptions tend to reduce the general danger?

We are unable to see that this industry falls within any of the recognized reasons for limitations and discriminations against it? And without some such reason it must be held to be unwarranted and therefore unconstitutional.

In the case of Gulf, Colorado & Sante Fe Ry. Co., vs. Ellis, *supra*, Mr. Justice Brewer said:

> "Classification to relieve a law from the charge of a denial of equal protection can not be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification."

III.

Constitutional Provisions Violated.

It follows from what we have said that as the statute is unreasonable and arbitrary and is a discrimination against the owners and herders of sheep, a well established, harmless, industry, it violates not only the 14th Amendment, which guarantees protection to the citizen against the abridg-

ment of his privileges and immunities, but it likewise deprives him of due process of law and denies to him the equal protection of the laws in violation of other provisions of the Constitution.

In the new work of McGehee on Due Process of Law under the Federal Constitution, the author at p. 306 says:

> "A general limitation on the exercise of the Police Power is found in the idea of reasonableness; that is, to be valid, a statute must be reasonable and enacted in good faith (Plessy vs. Ferguson, 163 U. S., 550); for every merely arbitrary and capricious fiat of the Legislature is out of place in 'a government of laws and not of men,' and is irreconcilable with the conception of due process of law.
>
> "As the reasonableness of legislation is a matter preeminently for the consideration of the law-making branch of the government, the court will not examine the question *de novo* and substitute its judgment for that of the legislature, but will pronounce the law void only where it is merely arbitrary or not enacted in good faith."

The author cites a number of decisions of this court in support of the doctrine stated.

Again the same author at p. 345 says:

> "To determine what contracts or what occupations are injurious to public health or morals rests in the legislature exercising the Police Power, and the courts can not interfere with its decision, 'unless looking through mere forms and the substance of the matter, they can say that the statute enacted professedly to protect the public morals (or health) has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." Citing Booth vs. Ill., 184 U. S., 425.

In the celebrated Laundry case of Yick Wo vs. Hopkins, 118 U. S., 356, Mr. Justice Mathews speaking for the court,

referring to the rights protected by Due Process of Law, quoting the last phrase from the Massachusetts Bill of Rights, said:

> "They are not, therefore, in a strict sense "inalienable," nor was this constitutional clause intended to render them exempt from the control of the state, acting in a legal manner, that is, according to 'Due Process of Law.' The purpose of the provision was to secure the life, liberty and property of the individual from the action of purely personal and arbitrary power, and to place them under the protection of 'a government of laws and not of men.'"

This court in the case of Plessy vs. Ferguson, *supra*, referring to the Police Power said:

> "Every exercise of the Police Power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

It is impossible to conceive of any other purpose for the legislation embraced in the statute under consideration, except that of the "annoyance and oppression" of the class of people in Idaho who owned, herded or grazed sheep. It is also made clear from the decisions of the Supreme Court of Idaho that the statute grew out of conflicts between the cattle and sheep interests in that state. In fact the decisions in the cases at bar were based upon the doctrine of *stare decisis*, the court referring to the decisions of that court in the cases of Seifers vs. Johnson, 65 Pac., 709, and Sweet vs. Ballentine, 69 Pac., 995, wherein the court, two of the judges for and one dissenting, sustained the constitutionality of the act in question. It is thus seen that the Supreme Court of Idaho has always been divided upon the question of the constitutionality of this law.

In the majority opinion of the court in the cases above referred to, in one of which the plaintiff recovered judgment for damages against the defendant for grazing sheep upon the public domain, it was said by the court that there was no statute authorizing the pasturing of stock upon the public lands, but at the same time held that the plaintiff because he held a possessory title to land upon which his house was situated might recover from others damages from pasturing sheep upon any of the public lands within two miles of his house. It is hard to understand upon what theory the plaintiff in such case could recover damages. What right had he, other and different from anyone else to the grasses growing upon the public domain outside of and beyond any claimed title or possession by him? We have seen that under the decision announced by Mr. Justice Miller, in Buford vs. Houtz, 133 U. S., 320, that the United States has not forbidden, but has directly encouraged the pasturage of the public domain by any and all persons, and in the decision announced by Mr. Justice Brown, in the case of Kelly vs. Rhoades, 188 U. S., 1, that Kelly in driving his sheep across the public domain "was at liberty to consider the fact that he was licensed to make use of the public lands of the United States, without charge for the sustenance of his sheep." Fortunately for him he was in Wyoming and not in Idaho, else he would have had to pay damages to someone who had no more right whatever to the use of the grass than he had. The mere statement of this case is sufficient to show that it clearly violates the provisions of the constitution hereinbefore enumerated, and hence should be held to be void.

But if there was any doubt as to the real purpose of this act, an examination of the decisions of the Supreme Court of Idaho, *supra*, sustaining it as a proper exercise of the Police Power, would show what it was. The court held that in fixing the amount of damages to which the householder was entitled it was proper to admit evidence show-

ing what stock he himself had to pasture. In other words, the herder of the sheep who happened to get within the arbitrary limit of two miles of a house would be compelled to pay ten times as much damages to the owner of ten head of cattle, as he would have to pay if he was the owner of but one; and this too, without reference to the amount of grass belonging to the United States his sheep had consumed. Is this due process of law?

Again, in view of this, how can it be held that it is a question of health, comfort, safety or security? It is based wholly upon the proposition that as against all sheep owners or herders, the owner of a house on a possessory claim is entitled to the exclusive right not only to pasture the public domain outside of his claim and for a distance of two miles in every direction, but is in addition entitled to recoved damages from any herder of sheep who invades this area, part of the public domain, it may be, not in proportion to the grass consumed, but in proportion to the stock the householder happens to own. Is this a reasonable exercise of the Police Power? We hardly think so.

It is said the purpose is to encourage settlement of the public lands? But is it for the general welfare and in harmony with the method of disposing of the public lands, to discriminate against an old and well established industry in which large capital has been and is invested; an industry as old as civilization and as harmless as any ever engaged in by man.

This is so clearly class legislation that it is difficult to conceive how it can have the sanction of the courts.

S. M. STOCKSLAGER,
Attorney for Plaintiffs in Error.

W. E. BORAH,
FRANK C. WYMAN,
JOHN C. RICE,
of Counsel.

Supreme Court of the United States.

No. 147.—October Term, 1906.

Orlando F. Bacon, Plaintiff in Error, vs. Paul H. Walker et al. } In error to the Supreme Court of the State of Idaho.

[February 4, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

This action involves the validity, under the Constitution of the United States, of the following sections of the Revised Statutes of the State of Idaho:

"Sec. 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or permit them to be herded on the land or posessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim.

"Sec. 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Defendants in error under the provision of those sections brought this action, in the Justice's Court of Little Camas Precinct, Elmore County, State of Idaho, for the recovery of $100 damages alleged to have accrued to them by the violation by plaintiff in error of the statutes, and obtained judgment for that sum. The judgment was successively affirmed by the District Court for the county of Elmore and the Supreme Court of the State. 81 Pac, 155. The case was then brought here.

It was alleged in the complaint of defendants in error, who were plaintiffs in the trial court, that plaintiff in error caused his sheep, about three thousand in number, to be herded upon the public lands within two miles of the dwelling house of defendant in error. The answer set up that the complaint did "not state a cause of action other than the violation of sections 1210 and 1211 of the Revised Statutes of the State of Idaho," and that said sections were in violation of the Fourteenth Amendment of the Constitution of the United States. The specifications of the grounds of the unconstitutionality of those sections were in the courts below and are in this court (1) that plaintiff in error has an equal right to pasture with

other citizens upon the public domain, and that by imposing damages on him for exercising that right he is deprived of his property without due process of law; (2) that a discrimination is arbitrarily and unlawfully made by the statutes between citizens engaged in sheep grazing on the public domain and citizens engaged in grazing other classes of stock.

These grounds do not entirely depend upon the same considerations. The first denies to the State any power to limit or regulate the right of pasture asserted to exist; the other concedes such power, and attacks it only as it discriminates against the grazers of sheep. We speak only of the right to pasture, because plaintiff in error does not show that he is the owner of the land upon which his sheep grazed, and what rights owners of land may have to attack the statute we put out of consideration. *Reardon* v. *New York, ante*, p. . But we may remark that the Supreme Court of Idaho said in *Sweet* v. *Ballentyne*, 8 Idaho, 431, 440: "These statutes [sections 1210, 1211, quoted above] were not intended to prevent owners from grazing sheep upon their own lands, although situated within two miles of the dwelling of another." Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the State may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, and the State has an interest in the accommodation of those rights. It may even have an interest above such accommodation. The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark* v. *Nash*, 198 U. S. 361, a use of property was declared to be public which, independent of the conditions existing in the State, might otherwise have been considered as private. So also in *Strickley* v. *Highland Boy Mining Company*, 200 U. S. 527. In the first case there was a recognition of the power of the State to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the State to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offield* v. *The New York, New Haven & Hartford Railroad Company, ante*, p. , the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a State to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190. There a statute of the State of Indiana was attacked, which regulated the sink-

ing, maintenance, use and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances, oil and gas, with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed *situs*, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right, operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the State, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company* v. *Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power can not be exercised for the general well being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we can not pronounce them insufficient on surmise or on the barren letter of the statute. We may refer to *Sifers* v. *Johnson*, 7 Idaho, 798, and *Sweet* v. *Ballentyne*, 8 Idaho, 431, for a statement of the practical problem which confronted the legislature and upon what consid-

erations it was solved. We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry.

Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and, enumerating the classes discriminated in favor of as cattle, horses, hogs, and even poultry, puts to question whether in herding or grazing sheep "there is more danger to the public 'health, comfort, security, order or morality' than the classes of animals and fowls above enumerated." "What," counsel ask, "are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely free from such danger, or do such exceptions tend to reduce the general danger?" Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the State, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited.

But the statutes have justification on the grounds which plaintiff in error urges as determinative, and on those grounds they were sustained by the Supreme Court of the State. They were deliberate enactments, made necessary by and addressed to the conditions which existed. They first (1875) had application only to three counties, while Idaho was a Territory. They were subsequently extended to two other counties and were made general in 1887. They were continued in force by the State constitution. *Sweet* v. *Ballentyne*, *supra*. The court said in the latter case:

"It is a matter of public history in this State that conflicts between sheep owners and cattle men and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the State that sheep are not only able to hold their own on the public ranges with other livestock, but will in the end drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to forbid the running at large of sheep altogether, recognizing the fact that there are in the State large areas of land uninhabited, where sheep can range without interfering with the health or subsistence of settlers or interrupting the public peace. The fact was

also recognized by the legislature that, in order to make the settlement of our small isolated valleys possible, it was necessary to provide some protection to the settler against the innumerable bands of sheep grazing in this State."

And the court pointed out that it was not the purpose or effect of the statutes to make discrimination between sheep owners and owners of other kinds of stock, but to secure equality of enjoyment and use of the public domain to settlers and cattle owners with sheep owners. To defeat the beneficent objects of the statutes, it was said, by holding their provisions unconstitutional would make of the lands of the State "one immense sheep pasture." And further: "The owners of sheep do not permit them to roam at will, but they are under the immediate control of herders, who have shepherd dogs with them, and wherever they graze they take full possession of the range as effectually as if the lands were fenced. . . . It is a matter of common observation and experience that sheep eat the herbage closer to the ground than cattle or horses do, and, their hoofs being sharp, they devastate and kill the growing vegetation wherever they graze for any considerable time. In the language of one of the witnesses in this case: 'Just as soon as a band of sheep passes over everything disappears, the same as if fire passing over it.' It is a part of the public history of this State that the industry of raising cattle has been largely destroyed by the encroachments of innumerable bands of sheep. Cattle will not graze, and will not thrive, upon lands where sheep are grazed to any great extent."

These remarks require no addition. They exhibit the conditions which existed in the State, the cause and purpose of the statutes which are assailed, and vindicate them from the accusation of being an arbitrary and unreasonable discrimination against the sheep industry.

Judgment affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

No. 81.

Charles Bown and Leander L. Ormsby, Plaintiffs in Error, *vs.* Enos C. Walling. } In error to the Supreme Court of the State of Idaho.

[February 4, 1907.]

Mr. Justice MCKENNA delivered the opinion of the Court.

This action was brought in the Probate Court in and for Elmore County, State of Idaho, for the sum of two hundred dollars' damages sustained by

defendant in error by the violation by plaintiffs in error of sections 1210, 1211 of the Revised Statutes of Idaho. The amended complaint alleged that the offense was committed by plaintiffs in error by wrongfully and negligently permitting and allowing their sheep to graze within two miles of the dwelling house of defendant in error and upon the Government lands around his premises. The defense, set up by demurrer, was, as in *Bacon* v. *Walker et al.*, that those sections were void under the due process and equality clauses of the Fourteenth Amendment of the Constitution of the United States. The trial court rendered judgment for the defendant in error, which was affirmed by the District Court for Elmore County and by the Supreme Court of the State. 9 Idaho, 740.

The case was argued with *Bacon* v. *Walker et al.*, and on the authority of that case the judgment is

Affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.